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Das islamische Recht*

von

PROF. DR. A. K. JULIUS GERMANUS

Die Einführung der Abhandlung ist ein historischer Überbick über die Vereinigung der einst zerstreut lebenden arabischen Stämme und über die Begründung des osmanischen Reichs. In einigen der arabischen Länder standen gewisse Wissenschaftszweige bekanntlich auf einem ganz hervorragendem Niveau, doch Recht und Rechtswissenschaft fehlten völlig aus der Kultur dieser Länder. Aus den Erörterungen des Verfassers wird den Lesern klar, welche Rolle Mohammed in der Herausbildung des islamischen Rechts spielte und auf welche Weise der Koran zur gemeinsamen Quelle der Religion und des Rechts wurde. Es bildeten sich die Hauptregeln des menschlichen Zusammenlebens heraus. Das islamische Recht und die Rechtswissenschaft setzten sich aus dem Koran und den Traditionen zusammen. Dieses Recht und diese Rechtswissenschaft haben sich dann im Laufe der Jahrhunderte bedeutend fortentwickelt. Die islamische Rechtswissenschaft ist eines der sonderbarsten Produkte des menschlichen Geistes.

Nach diesem historischen Umriß werden die vier bedeutendsten Rechtsschulen beschrieben, ihre Grundsätze verglichen und schließlich die menschlichen Handlungen aufgrund einer Gruppierung von Religionsphilosophen dargestellt. Daraus leitet der Verfasser die verschiedenen Kategorien der strafbaren Handlungen ab, und befaßt sich dann eingehend mit dem islamischen Strafrecht. In diesem Zusammenhang werden auch die verschiedenen zivilrechtlichen Folgen der strafbaren Handlungen besprochen, wie z. B. die Frage der zivilrechtlichen Verantwortlichkeit bzw. des Schadenersatzes.

Im letzten Teil faßt die Abhandlung die Entwicklung bzw. die Umwandlung des islamischen Rechts nach dem Zerfall des osmanischen Reichs zusammen. Aus der Reihe der dem islamischen Recht folgenden Länder wird die Türkei hervorgehoben, wo im Modernisierungsprozeß das Strafrecht Italiens und das bürgerliche Recht der Schweiz übernommen wurde. Die übrigen, größtenteils arabischen Länder haben ihr früheres Recht beibehalten, das sich aber den Erfordernissen der modernen Zeit sehr schmiegsam anpaßte.

Als Abschluß weist der Verfasser noch kurz auf die Regelung der Personenrechte und des Familienrechts, auf die Institution der Ehe hin, berührt auch das Sachenrecht und das Obligationenrecht. Das öffentliche Recht wird bloß als ein heute noch kaum entwickeltes Gebiet des islamischen Rechts erwähnt.

Das Rechtssystem des Islam ist im Morgenland entstanden. Im dem Morgenland, das wie die Sonne im Osten, zuerst ihre Strahlen zerstreute um allmählich sich nach dem Westen auszubreiten. Das Arabertum und die mit ihm durch die Bande des Islam vermischten Völker schufen im Mittelalter eine Kultur, die jahrhundertelang Quelle der europäischen geistigen Erwachung geblieben war. Die von den alten Griechen übernommene Philosophie erwuchs

* Die Abhandlung ist ein kurzgefaßter Originaltext zweier Vorträge, die der Verfasser in Wien gehalten hat.

siegreich in arabischer Sprache. Die dem mittelalterlichen christlichen Westen verschlossenen Naturwissenschaften — Algebra, das Dezimalsystem, die Dreisatzrechnung, Geometrie, die Chemie, Astronomie, Geologie und Erdkunde, Theologie und Sprachwissenschaft — fanden durch islamische Denker, Vertreter solcher Errungenschaften, die noch heute Bewunderung der Kulturhistoriker hervorrufen. Der Islam, als Religion und Gesellschaftssystem erschloß dem Menschen auf Erden eine Wirklichkeit und eine Märchenwelt, aus deren Born unzählige westliche Dichter geistiges Gut schöpften. In dieser Wirklichkeit — und Märchenwelt — entstand auch das islamische Religionsrecht, das von hunderten von Millionen Muslimen jahrhundertelang vom Atlantischen Ozean bis zum Gelben Meer als Richtschnur ihres Lebens diente. Deshalb ist seine Kenntnis auch für Europäer, Juristen, Kulturhistoriker und Literaten wichtig.

Die unwirtsame Riesenhalbinsel Arabiens war in der Urzeit zum größten Teil bloß zum zeitweiligen Weiden der Schafe, Ziegen und Kamele geeignet. Die ausgedehnten Wüsten wurden bloß spärlich von kurzfristigen Flüssen durchkreuzt, und verliehen den wandernden Viehzüchtern Erholung von der Hitze, Durst und Entbehrung. Die Oasen, arabisch *Uádi* schienen den Wüstensöhnen wahre Paradiese, wo neben und nach müheloser Arbeit geselliges Leben und dessen Freuden genossen werden konnten. Im rauhen Leben der Wüsten entstand ein harter Menschenschlag, der in Stämme gespalten tagtäglich in schwerem Kampfe um das Dasein sich behaupten mußte. Um dies kümmerliche Dasein zu sichern, um rasch verdorrene Saat und Gräser einzuheimsen oder diese gegen hungergequälte Nebenbuhler zu verteidigen, entspann sich ein jahrelanger Streit und blutiger Kampf, der nur selten in einem kurzfristigen Frieden endete.

Das Rechtsleben der arabischen Stämme wurde naturgemäß von den Produktionsverhältnissen und deren gesellschaftlicher Ausstrahlung bestimmt. Das Familienleben, das wirtschaftliche Bestreben und das geistige Gut war von Natur aus vorherbestimmt und hatte ihre engen Grenzen, ebenso wie das Festland Arabiens selbst. Durch Jahrhunderte bildete sich in diesem engen gesellschaftlich-wirtschaftlichen Rahmen fast instinktiv ein Gewohnheitsrecht aus, das den einfachen Verhältnissen entsprach. Wüstenaraber ehrten ihre tapferen Helden und errichteten ihnen nach dem Tode Standbilder. Sie glaubten an verschiedene Naturerscheinungen und ehrten dieselben aus Furcht durch Götzenbilder, die eng mit dem Leben der einzelnen Stämme verbunden waren. Totschlag wurde durch Blutrache bestraft oder in Schwebe gehalten. Das Eheleben und dessen Ausarten entsprach dem rauhen Wanderleben der Beduinen. In allen zweifelhaften Fällen beriefen sie sich auf die Überlieferung der Ahnen, — und diese regelte ihr von Freude und Leid durchwobenes Treiben auf Erden. Karavanenhandel brachte die Araber in Berührung mit der Außenwelt und viel achtenswertes geistiges Material kam in die wenigen Städte.

Die Stadt im westlichen Arabien, Mekka, wurde durch das Wunder eines schwarzen Meteor-Steines von allen übrigen Siedlungen emporgehoben, denn die Verehrung dieses Steines war als Gemeingut von allen friedlichen oder kriegerischen Stämmen angenommen. Die jährliche Pilgerfahrt zu diesem Heiligtum entwickelte ein reges wirtschaftliches Leben in Mekka, das infolge der Verbindung mit den Nachbarländern zu einem gewissen Wohlstand seiner Bewohner führte.

In Mekka, im Heiligtum der heidnischen Araber wurde Mohamed im Jahre 571 geboren. Das Auftreten Mohammeds mit seinen gottgesandten Eingebungen ist einer der größten Wendepunkte in der menschlichen Geschichte. Durch die Offenbarungen und deren Verwahrung im Koran — als Worte Gottes — hat Mohammed die in Stämme zerklüfteten Araber zu einer einheitlichen religiösen Nation geschmiedet, die die bisher in gegenseitigen Kämpfen verbrauchten Kräfte der Araber in eine einheitliche Macht verwandelte und sie zur Eroberung, der in haarspaltenden Zwisten der christlichen Sekten uneinigen Bewohner der fruchtbaren Ländereien — Syrien, Ägypten und Irak — führte. Aus den verschiedenen Mundarten der Stämme entstand eine hochliterarische arabische Sprache im Munde der heidnischen Dichter, die nachher im »göttlichen« Koran geheiligt wurde und aus den einander befehdenden Stämmen erwuchs eine todesverachtende, selbstbewußte arabische Nation, die ein mächtiges Reich gründete. Das geschichtliche Wunder hielt aber nicht da still, sondern wurde durch Begebenheiten, Tatsachen und Zustände vervielfältigt und bereichert. Das gesellschaftliche Leben der erobernden Araber und ihre Beziehungen zu den unterworfenen Volkschaften fanden die bloß an ein Gewohnheitsrecht verbundenen Araber in Verlegung. Was dem einseitigen Wüstenleben genügte, war für das große arabische Reich nicht auslangend. Unbekannte Verhältnisse stießen vor und die durch Meere und fruchtbare Festlande zusammengefügte Gesellschaft forderte ein Rechtssystem, das die alltäglichen Begebenheiten prinzipiell in ein festes Gefüge verlagert, allen Erforderungen wahrheitsgemäß nachkommen mußte.

In Medina, wo der aus Mekka vertriebene Prophet Mohammed seine kleine Gemeinde organisierte, Pflichten den Gläubigen auferlegte — wie das Gebet zu dem einzigen Gott als Schöpfer und Weltenherrscher, die Armensteuer als soziale Hilfe, die Enthaltsamkeit von Trunkenheit, das Verbot der gegenseitigen Befehdung der Stämme, Strafe gegen Unzucht und Regelung des Ehelebens — entstand schon die Wurzel eines Rechtssystems, das — zwar aus dem traditionalen Boden erwachsen — eine grundsätzliche neue Weltanschauung ins Leben rief. Diese Weltanschauung stützte sich auf eine bisher in Arabien von vielen nur geahnte, aber der Gesamtheit verschlossene Überzeugung, daß es keine falschen Götter gäbe, sondern es gibt bloß einen einzigen Gott, den Schöpfer, der dem Menschen alle Wohltat gedeihen ließ, der die guten Taten belohnt, die schlechten mit harten Strafen belegt. Diese Überzeugung

schöpfte ihre Kraft aus dem innigsten Gefühle des Menschen, aus einem instinktiven Bewußtsein der *Moralität*, der *Pflichttreue* und dem *seelischen Zwang der Rechenschaft*. Die neue Weltanschauung der Araber hieß *Islam*, Ergebung in dem Willen Gottes. Kein irdischer Herrscher, Stammhäuptling oder riesenhafter Urahne kann nunmehr Verordnungen, Gesetze und Gebote erlassen und vollziehen. Eine dem menschlichen Verstand unfaßbare, aber in der Natur überall gegenwärtig wirkende Gewalt hat das einzige Recht und auch die Macht, dem Menschen den richtigen Weg in seinem Wandel auf Erden zu zeigen, ihn zur Seligkeit zu führen.

Mohammed fühlte, daß er zur Verkündung des göttlichen Willens auserkoren wurde und legte die Offenbarungen, die von Zeit zur Zeit ihn erreichten im *Koran* nieder. Wer kann die Eingebung einem des Schreibens und Lesens unkundigen Mann die geistige Überlegenheit leugnen, die im Koran ein einzigdastehendes Wunder hervorbrachte . . . Der Koran als geheiligtes Gebot für die Gläubigen wurde nur nach dem Tode des Propheten endgültig abgeschrieben, in vielen Exemplaren verbreitet, um im geselligen Leben als Richtschnur zu dienen. Wenn im geselligen Leben man im Koran für Begebenheiten, Vorfälle keine Verordnungen vorfand, versuchte man im Leben des Propheten Aussagen, Beispiele dafür zu finden, wie der Prophet sich verhalten hat, oder verhalten hätte. Das ist die Überlieferung. So entstand das islamische Recht, gestützt auf die Religion des Islam, in der festen Überzeugung, daß die Beurteilung aller rechtlichen Handlungen in dem zu erschließenden göttlichen Willen — der in dem Koran durch den Propheten geoffenbart wurde — verankert ist. Kein Herrscher, kein Gelehrter, keine Institution ist im Sinne des Islam fähig und befugt, einen untrügerischen Weg zur geselligen Lebensgestaltung zu öffnen. Der Islam befolgt einen ganz eigenartigen Weg. Bei ihm entspringen Religion und Recht einer und derselben Quelle. Die Wissenschaft *(fiqh)* lehrt praktisch bindende Rechtsnormen.

Der Islam erfaßt das ganze innere und äußere Leben des Menschen, also auch seine Denkweise und seine Handlungen, und der Muslime muß alle Verfügungen die auf dem Willen Gottes beruhen einhalten, ob er andächtig betet oder fastet, ob er als Geschäftsmann einen Kauf oder Verkaufvertrag schließt, ob er als Soldat die Waffe führt, oder ob er als Verbrecher die Strafe erleidet.

In diesem Prinzip liegt die Einheitlichkeit der Hauptfaktoren des menschlichen Zusammenlebens. Wir, die die Geschichte der islamischen Völker studieren, dürfen nicht außer Acht lassen, daß bei ihnen die Herrschaft der Religion mehr ausgedehnt ist, als bei den Europäern, und daß Religion und Recht derselben Quelle entspringen. Man darf auch nicht vergessen, daß der Islam im Mittelalter die führende Rolle im geistigen Leben der Menschheit innehatte, und das geistige Leben wurde wie eine gotische Kirche architektonisch, also auf *a priori* Grundsätzen aufgebaut. Die Lehren der christlichen Religion selbst nähern sich dem Islam, denn auch laut dem Christentum stammt die Gewalt

von Gott und so ist auch die dem Christentum entsprechende Ausübung der Gewalt eine göttliche Angelegenheit. Die Geistigkeit des Mittelalters wollte auch im Christentum die *Civitas Dei*, die Herrschaft Gottes verwirklichen.

Nun, wie erwähnt: führt zur Erkenntnis des göttlichen Willens im Islam der Koran und die Traditionen des Propheten, also seine Taten und Aussagen. Im Falle diese ungenügend erscheinen, schließen sich ihnen die Hilfsmittel: die übereinstimmende Auffassung *(idschmá')* der berufenen Nachfolger, und die Rechtsanalogie, *(Qiyás)* an.

Das europäische Publikum befindet sich in dem Irrtum, daß die gesamte Rechtswissenschaft der Muslime in dem Koran und in den Traditionen erschöpft sei, während doch das islamische Recht ein, durch viele Jahrhunderte ausgearbeitetes mächtiges Rechtssystem ist, welches als Wissenschaft zu den merkwürdigsten Produkten des menschlichen Geistes gehört. Die angenommenen Rechtsquellen bilden nicht ein einheitliches Rechtssystem, sondern enthalten stellenweise einen allgemeinen Rechtsatz oder eine Entscheidung in konkreten Fällen, Enunziationen, Vorschriften, oder Direktiven ohne Zusammenhang. Es bedarf der Mitwirkung des menschlichen Verstandes, damit die Gesetze, welche aus diesen Rechtsquellen gewonnen sind, miteinander vereinbart und zu Vorschriften ausgearbeitet werden, um im praktischen Leben verwertbar zu sein. Die Mitwirkung des menschlichen Verstandes ist jedoch gleichbedeutend mit der größten Verschiedenheit, sowohl in den angewandten Methoden wie in den erzielten Ergebnissen. Hieraus entspringt, daß die, aus den Rechtsquellen abgeleiteten Vorschriften nach der Verschiedenheit der Rechtsschulen voneinander abweichen. Was nach der einen Schule richtig ist, das kann nach der anderen Schule unrichtig sein.

In der frühen Entwicklung des islamischen Rechtes entstanden mehrere Richtungen, *madhab* — »Wege« genannt, von denen nur jene fortlebten, welche unter dem Schutze des Herrschers oder einer politischen Partei gestanden sind, die übrigen mußten der dominierenden öffentlichen Anschauung weichen. Selbst die Richtung des berühmten Koranauslegers und Historikers Tabari (st. 922) wurde verdrängt. Dasselbe Geschick erreichte die Schule des *Daúd ibn'Ali az-Záhiri* (st. 883) die sogenannte *Záhiri*, welche zwar lange Zeit in West-Afrika und im arabischen Spanien blühte, und den Koran wörtlich als göttliche Offenbarung auslegte und die Überlieferung des Propheten als juridische Grundlage bestimmte.

Vier Schulen jedoch behaupteten sich im Laufe der Zeit, die als streng rechtgläubig anerkannt und von Regierungen von Zeit zur Zeit geschützt wurden. Diese sind die Schulen des *Málik ibn Anas* (st. 795), des *Abu Hanifa* (st. 767), *des Scháfi'i* (st. 819) und des *Ahmed ibn Hanbal* (st. 855). Das System dieser vier Schulen ist die Bezugnahme auf Gewissensfragen und aus den Quellen gewonnener Erörterung *(Idschtihád)*, und mit ihrem Ergebnisse ist diese Geistesrichtung abgeschlossen. Was nach ihnen kommen dürfte ist bloß Nach-

ahmung, *taqlid*, das heißt: Anschluß an eine von den orthodoxen vier Schulen.

Die Schule des *Málik ibn Anas* vertritt die Richtschnur des Propheten und seiner Anhänger in Medina, die in den von ihm gesammelten Überlieferungen niedergelegt ist. Diese Schule blühte in der Vergangenheit in Spanien und ist heute sporadisch in West-Afrika, Sudan und Irak beliebt.

Die Schule des *Abu Hanifa* sichert einen größeren Raum der Analogie in Rechtsfällen als *Málik ibn Anas*. *Abu Hanifas* System atmet den Geist der Autorität. Er stützte sich auf den Koran. Er nahm einen Text her, der einen Fall entscheidet und entwickelte aus ihm auf dem Wege der Deduktion Entscheidungen über zahlreiche andere Fälle. Bei dieser Deduktion war er von seiner Ansicht *ra'y* geleitet. Diese Schule war im osmanischen Reich vorherrschend.

Die Schule des *Schá fi'i* kann als Ausgleich zwischen den beiden, obengenannten angesehen werden. Sie verbreitete sich unter den Abbasiden in Irak, Mittel-Arabien, Ost-Afrika, Unter-Ägypten und auch Indonesien. Von *Málik* nahm er die öffentliche Meinung, aber brach ihr die Spitze ab. Wo die öffentliche Meinung mit dem Koran und der prophetischen Überlieferung in Widerspruch steht, wird sie ausgeschaltet. In der Ansicht des *Schá fi'i* steht die Praxis des Propheten *(Sunna)* an Wert dem Koran gleich. *Schá fi'i* wurde von den Rechtsgelehrten als den Begründer der Wissenschaft von den Quellen der Rechtskunde *('ilm usúl-al-fikh)* im Gegensatz zu der Wissenschaft von den rechtlichen Einzelbestimmungen *('ilm furú'al-fikh)* hingestellt.

Die vierte kanonisch anerkannte Schule ist die des *Ahmed ibn Hanbal*, die sich streng auf die Offenbarung und Überlieferung des Propheten stützt. Aus dieser Schule entstand vor zwei Jahrhunderten der Wahhabismus des *Abdul-Wahháb*, die in Arabien und in einigen Randstaaten blüht.

Die Verschiedenheiten zwischen den Schulen sind vielmehr scheinbar als wahrhaftig. Jeder Gläubige gehört irgendeiner kanonischen Schule an, kann aber seine Anhängerschaft ohne davon Anmeldung zu erstatten, ändern. In einer Familie können verschiedene Schulen berücksichtigt werden. In besonderen Fällen können Juristen aus den nachbarlichen Schulen Ansichten entlehnen. Um von den Verschiedenheiten der vier Schulen Beispiele zu geben, erwähne ich, daß alle vier Schulen zum ritualen und liturgischen Gebrauch den Koran als Text annehmen. Gemäß *Schá fi'i* muß man die Formel des Gebetes arabisch rezitieren. *Abu Hanifa*, der persischen Ursprungs war, gestattete, daß der Fremde, der unfähig ist, das Arabische zu erlernen oder auszusprechen, in seiner Muttersprache beten kann.

Darf ein nicht-Muslim den Koran lehren, oder darf man den Koran übersetzen? *Abu Hanifa* ist in dieser Frage freisinnig. *Ibn Hanbal* — obwohl in allen Fällen streng — sieht kein Vergehen darin, *Schá fi'i* äußert sich gegensätzlich: *per et contra*. *Málik* verpönt die Übersetzung glatt. *Ibn Hanbal* und *Hanifa*

erlauben eine Übersetzung als Erläuterung unter den Zeilen des Originals. In Frage der Beschneidung weichen die Schulen ab, obwohl keine sie für eine unumgänglich notwendige Pflicht hält.

Muß das Gebet laut oder leise hervorgesagt werden? *Abu Hanifa* und *Schâfi'i* sind liberaler Meinung gegenüber *Málik*. Die Anhänger von *Ibn Hanbal* erheben ihre Hände nicht zu den Ohren beim Aussprechen des Allah Akbar; *Abu Hanifa* mißbilligt die Gegenwart der Frauen beim Gebet in der Nähe der Männer. Die Anhänger von *Schâfi'i* betrachten das Almosengeben im Fastmonat Ramadhan, als Pflicht, die Hanefiten erachten es bloß als tunlich, die Málikiten als gebräuchlich. *Abu Hanifa* wünschte, daß die Kriegsgefangenen entweder getötet, oder als Sklaven behandelt werden. *Schâfi'i* meinte, daß sie für Lösegeld freigesprochen werden. *Abu Hanifa* gestattete die Ehe mit einer christlichen Gattin, *Schâfi'i* mißbilligte sie. Kann man ein Findelkind als Muslim betrachten? Mit Ausnahme des *Abu Hanifa* antworten die übrigen drei Schulen: »ja«. *Abu Hanifa* mäßigt seine Ansicht dazu, daß es Muslim sei, wenn es auf muslimischen Boden gefunden wurde. *Málik* und *Schâfi'i* bestimmten den vom Islam Abtrünnigen zum Tode, *Abu Hanifa* wünscht, daß dem abtrünnigen Manne der Islam wieder angeboten wird. Hat er einen Zweifel, wird dieser zerstreut, verlangt er Bedenkzeit, so wird er für drei Tage eingeschlossen. Bekehrt er sich, dann wird ihm nichts zu leide getan. Beharrt er jedoch bei seiner Abtrünnigkeit, so muß er getötet werden. Die Frau wird wegen Abtrünnigkeit nicht getötet, doch wird sie eingeschlossen gehalten, bis sie sich bekehrt. — *Abu Hanifa* erlaubt die Hinrichtung eines Muslims, wenn er einen nicht-Muslim getötet hat, die übrigen drei Schulen verbieten die Hinrichtung.

Die Richter müssen sich nach einer der vier kanonischen Schulen halten und anpassen. Derjenige, der sie nicht berücksichtigt, sondern versucht, selbständig aus dem Koran und aus der Überlieferung Rechtsätze zu ziehen, wird als freier Forscher *(idschtihád mutlak)* betrachtet, darf aber nur gemäß Vergleichung der vier Schulen vorgehen.

Wenn ein Rechtgläubiger fühlt, daß seine Kenntnisse nicht genügen, um ihm in der gegebenen Lage einen sicheren Standpunkt zu gewähren, kann er sich an eine anerkannte Autorität wenden zu der er als einem gottesfürchtigen und gelehrten Juristen Vertrauen hat. Diese Autorität gibt ihm eine rechtliche Antwort, *fatwa* genannt, und die Autorität selbst hat den Namen *Mufti*. Viele Juristen erblicken in dieser Praxis die Spuren des Römischen Rechtes, nämlich die *Responsa Prudentium*, die im byzantinischen Syrien noch zur Zeit der arabischen Eroberung im Leben war.

Die Schiiten betrachten die Seelsorger der unfehlbaren *Imame* die *Mudschtahiden* als Quellen der öffentlichen Meinung, und erkennen nur die Autorität an. Sie stützen sich nicht auf die Lehren der obenerwähnten Schulen. Die Schiiten kennen von den Überlieferungen des Propheten nur diejenigen als autorative an, deren Traditoren aus der Sippe des Ali herstammen.

In der Besprechung des Religionsrechts, selbst in Einzelheiten, befolgte ich als Richtschnur die Vorträge meines verehrten Lehrers weiland Professor Dr. Johan Krečmarik, gestützt auf den arabischen Text des *Multaqa'l-Abhur* (Zusammenfluß der Meere) des Burhaneddin ibn Muhammad al-Halebi (gest. 1549).

Die Religionsphilosophen teilen die menschlichen Handlungen nach ihrem Werte vom Gesichtspunkte des Guten und des Bösen aus in mehrere Hauptgruppen ein.

1. Es gibt Handlungen, bezüglich welcher zweifellose Beweise *(dalil)* bestehen, daß Gott sie angeordnet hat *(fardh)*. Solche sind das Gebot zu fasten, für den vermögenden Menschen die Pilgerfahrt, und die Vermögenssteuer. Wer an die bindende Kraft dieser Handlungen nicht glaubt, wird zum Gottesleugner, und wer sie nicht befolgt, unterliegt einer Strafe im Jenseits.

2. Handlungen, welche Gott wohl angeordnet hat, bezüglich deren jedoch hinsichtlich der Beweise bei den Gelehrten Zweifel aufgetaucht sind *(wádschib)*, zum Beispiel: Almosengeben bei dem Fasten, das Opfern bei dem Pilgerfeste. Wer von diesen Handlungen absieht, dessen harrt eine Strafe im Jenseits.

3. Handlungen, welche auch der Prophet häufig übte *(sunna)*, zum Beispiel: das Beten in der Versammlung, die Beschneidung der Knaben, fallweise der Mädchen. Wer diese nicht befolgt, der sühnt wohl nicht im Jenseits,doch verdient einen Tadel und kann nach dem Tode nicht auf das Wohlwollen des Propheten rechnen.

4. Handlungen, welche der Prophet manchmal geübt hat und sagte, daß diese eine Belohnung verdienen *(mustahabb, nafl, mandúb)* zum Beispiel: die nicht verbindlichen Gebete und Almosen. Wer von diesen als gefällig bezeichneten Handlungen absieht, verdient nach Ansicht mancher bloß einen Tadel.

5. Gleichgültige Handlungen *(mubáh)*, das sind solche, welche keine Belohnung verdienen und deren Unterlassen nicht als Sünde betrachtet wird, zum Beispiel: das Sitzen, Stehen, Schlafen, Essen, Sprechen und so weiter.

6. Verbotene, das sind Handlungen, welche Gott entschieden verbietet *(harám)*, wie das Weintrinken, Widersetzlichkeit der Kinder gegen Eltern, Totschlag. Wer eine verbotene Handlung begeht und seine Sünde nicht bereut, unterliegt einer Strafe im Jenseits und wer das Verbotene für gestattet erklärt, ist ein Gottesleugner. Wir dürfen nicht vergessen, daß das islamische Recht auf der Religion beruht.

7. Abstoßende *(makrúh)*, das sind Handlungen, welche wohl begangen werden können, doch handelt der sie begeht, schlecht und infolgedessen entgeht ihm die sonst für gute Handlungen erwartete Belohnung. Zum Beispiel: Beten zu ungeeigneter Zeit, Almosengeben öffentlich in der Moschee, das Prahlen mit Reichtum.

Das Strafrecht des Religionsrechts befaßt sich mit denjenigen Handlungen, welche zur Gruppe der verbotenen Handlungen gehören. Das Begehen der verbotenen Handlungen ist nicht nur mit einer Strafe im Jenseits verbunden, sondern ist schon in dieser Welt mit einer entsprechenden Strafe zu belegen, damit der Mensch von dem Begehen des Bösen abgehalten wird.

Jene bösen Handlungen, welche eine Strafe nach sich ziehen, können sich richten: gegen die eigene Vernunftsfähigkeit des Menschen *('aql)*, zum Beispiel das Weintrinken im allgemeinen und die Trunkenheit; gegen die Reinheit der Abstammung *(nasab)*, wie die Unzucht; gegen das Vermögen *(mál)* eines andern, wie Diebstahl und Straßenraub; gegen die Ehre *('irdh)* eines andern, wie die Verläumdung; gegen das Leben *(nafs)*, und die körperliche Unversehrtheit *(atráf)* eines andern, wie Totschlag und körperliche Verletzung und schließlich gegen die Ruhe und den Frieden der Bürger im allgemeinen.

Das Recht, die Bestrafung der bösen Menschen zu fordern steht entweder Gott oder dem Menschen zu. Die Bestrafung der Unzucht, des Weintrinkens, der Trunkenheit, des Diebstahls und des Straßenraubes ist ein rein göttliches Recht. Durch das Begehen dieser strafbaren Handlungen ist Gott selbst verletzt, denn nach dem Grundsatz des religiösen Rechts *(Shari'a)* stört der Täter die zur Ermöglichung des menschlichen Zusammenlebens geschaffene göttliche Ordnung.

Die Strafen der strafbaren Handlungen hat entweder Gott selbst durch Koran, Sunna oder öffentliche Meinung *(Idschmá')* festgestellt, oder es kann sie den Umständen entsprechend und nach seiner besten Einsicht das Staatsoberhaupt feststellen. Dementsprechend sind zweierlei Strafen zu unterscheiden, nämlich bestimmte *('uquba muqaddara)*, das sind unabänderliche Strafen; und nicht bestimmte Strafen, das ist, von der Einsicht des Richters abhängige Strafen.

Ein Hauptprinzip des islamischen Strafrechts ist, daß den Strafen jeder zurechnungsfähiger Mensch ohne Ausnahme unterworfen ist. Von dieser Regel ist selbst das Staatsoberhaupt nicht ausgenommen.

Nun möchte ich an die Erörterung der einzelnen strafbaren Handlungen schreiten. Es gibt:

1. Die zu den göttlichen Rechten gehörenden bestimmten Strafen *(hadd)*;

2. die zu den menschlichen Rechten gehörenden bestimmten Strafen *(qawad, qisás)*;

3. die unbestimmten Strafen *(ta'zir)*.

Es gibt folgende Sünden: *Die Unzucht (ziná)*. Die für diese festgestellte Strafe gehört zu den göttlichen Rechten. Durch dieses strenge Verbot soll die Lauterkeit der Familienabstammung bewahrt werden. Dementsprechend kann von Unzucht nur dort die Rede sein, wo die Lauterkeit der Familienabstammung in der Tat durch Handlungen der Schuldigen gefährdet ist. Einfaches

Küssen, Kosen oder Perversität stellen die strafbare Handlung der Unzucht noch nicht fest. Bei Bemessung der Strafe muß untersucht werden, welcher der Familienstand des Schuldigen zur Zeit der Begehung der Unzucht ist, denn die Strafe ist dementsprechend zweierlei Art.

In die erste Gruppe gehören jene Täter, die in einem anständigen Familienstande leben *(muhsan)*. Als solcher wird jeder großjährige, freie Mann und jede großjährige freie Frau, die gesunden Verstand haben, muslimischer Religion sind, und in einer konsumierten rechtwirksamen Ehe leben, betrachtet.

In die zweite Gruppe gehören diejenigen, welche außerhalb dieser Bestimmung fallen, also die Ledigen, Witwen, und die nicht zur moslimischen Religion gehörenden oder nicht freien Ehegatten.

Die Strafe des Mannes oder der Frau, die in einem anständigen Familienstande lebt, ist im Falle der Unzucht: die Steinigung. Jene Personen, welche nach der obigen Bestimmung nicht zu den im anständigen Familienstand lebenden gezählt werden können, werden im Falle der Unzucht mit hundert Peitschenhieben bestraft. Die Sklaven erhalten die Hälfte dieser Strafe.

Die Unzucht kann nur dann bestraft werden, wenn der Täter sie ohne Zwang, aus eigenem Entschluß bewußt begangen hat. Das Delikt der Unzucht ist entweder durch Geständnis oder durch Zeugenaussagen zu beweisen. Durch Zeugenaussagen kann dieses Delikt dann bewiesen werden, wenn vier männliche Zeugen zusammen zur selben Zeit Zeugenschaft über die Unzucht ablegen und zwar mit dem klaren Ausdruck, daß die Täter miteinander Unzucht getrieben haben. In Ermangelung vier männlicher Zeugen sind drei männliche und zwei weibliche Zeugen zum Beweis notwendig, denn allgemein dem Rechtswerte gemäß besitzt die Frau die Hälfte.

Zur richterlichen Feststellung des Deliktes genügt es daher nicht, wenn Zeugen nur aussagen, daß die Angeklagten untereinander geschlafen, gekost haben, sondern sie müssen die Unzucht direkt beweisen. Auch der Ausdruck verbotenen Beischlafs genügt nicht. Die kollektive Aussage der vier männlichen Zeugen ist ein wesentliches Erfordernis der Feststellung dieses Deliktes, daß wenn nur drei Zeugen erscheinen und dafür Zeugenschaft ablegen, daß jemand Unzucht getrieben habe, wird der Geklagte nicht nur keiner strafbaren Verantwortlichkeit unterzogen, sondern sogar die Zeugen wegen Verleumdung bestraft werden. Sobald der Richter die strafbare Handlung durch ein Urteil festgestellt hat, hat er die Strafe zu vollstrecken.

Bei der Steinigung wird der Verurteilte auf einen freien Platz geführt, wo das Volk in Reihen aufgestellt ist. Ist eine Frau verurteilt, dann ist diese behufs Wahrung des Schamgefühls in eine Grube zu stellen, so daß sie bis zur Hälfte in dieser steht, und dann zu steinigen. Schwangere Frauen dürfen nur nach ihrer Niederkunft und Genesung vom Wochenbette gesteinigt werden. Wenn zur Erziehung des Kindes niemand da ist, ist die Strafe bis zum Zeitpunkt, wo das Kind der mütterlichen Pflege entbehren kann, zu verschieben.

Mit dem Steinwürfen haben die Zeugen zu beginnen, nach ihnen folgen der urteilende Richter und das Volk. Der zum Tode gesteinigte Schuldige wird nachher gewaschen, dann laut Vorschriften der Religion in Leintücher gehüllt und schließlich betet man über ihm.

Wurde der Beschuldigte zur körperlichen Züchtigung verurteilt, dann werden ihm, wenn es sich um einen Mann handelt, die Kleider mit Ausnahme der notwendigsten unteren ausgezogen und er muß die Peitschenschläge stehend ertragen, welche nicht an einer Stelle, sondern mit Ausnahme des Schädels, des Gesichtes an verschiedenen Teilen des Körpers anzuwenden sind. Die Frauen legen bei der Züchtigung die Kleider nicht ab, ausgenommen die pelzartigen, welche die Schläge unwirksam machen würden; auch erleiden sie die Strafe sitzend.

Wie schon öfter erwähnt beruhen die rechtlichen Vorschriften auf göttlicher Offenbarung, die meistens von tatsächlichen Begebenheiten im Leben des Propheten hervorgerufen entstanden sind. Die Unzucht wurde als eine der schwersten Sünden betrachtet, deshalb verfügt die göttliche Eingabe, daß Ausdrücke, durch welche jemand einen anständigen Mann oder eine anständige Frau der Unzucht zeiht, als Verleumdung *(qadhf)* betrachtet und als Sünde bestraft werden muß.

Das Delikt der Verleumdung ist entweder durch Geständnis des Angeklagten, oder durch das Zeugnis von zwei männlichen Zeugen zu beweisen. Ihre Strafe besteht, wenn der Täter ein freier Mann ist, aus achtzig, wenn er ein Sklave ist aus vierzig Peitschenhieben.

Verleumden kann man nur, in dem man der verletzten Partei die beleidigende Ausdrücke ins Gesicht sagt. Sagt jemand Dinge, die sonst die Kriterien der Verleumdung an sich tragen, hinter dem Rücken eines andern, so kann dies eine böswillige Erfindung, eine Klatscherei, aber keine Verleumdung sein. Die Strafe gehört wohl zu den göttlichen Rechten, doch ist sie kein *rein* göttliches Recht, weil zum Teil auch menschliche Rechte in ihr erhalten sind. Wer einmal wegen Verleumdung bestraft war, kann nie mehr vor Gericht als Zeuge vernommen werden.

Ein dem Islam eigentümliches Verbot ist das Weintrinken *(schurb)*. In dieser Frage sind die Rechtsgelehrten nicht einig. Einige klammern sich an die strenge Bedeutung des Wortes im Koran *khamr*, als »Wein« an, andere dehnen die Bedeutung des Wortes *khamr* auf alle gährende, und folglich berauschende Getränke aus. Ich selbst schloß mich an letztere Deutung an — wie meine Studie im »Muslim Digest« (Febr. 1954) beweist—, denn sie entspricht dem Zweck des Verbotes, nämlich eine Schädigung der geistigen Fähigkeiten. Der Prophet erklärte, daß der Schaden des Weintrinkens größer sei als sein Nutzen. Die Strafe ist bei einem freien Mann achtzig, bei einem Sklaven vierzig Stockhiebe.

Allerdings wird nur die Trunkenheit als strafbare Handlung betrachtet. Das Genießen von berauschenden Getränken in dem Maße, wo keine Trunken-

heit verursacht ist, kann als Arzneimittel betrachtet werden. Das Maß aber ist sehr dehnbar, der Zweck des Verbotes ist zweifellos, den Menschen von der Schädlichkeit irgend welcher Rauschgifte: Alkohol, Haschisch, Opium und dergleichen zu bewahren. Die strengen Wahhabiten hatten ursprünglich auch den Kaffee und das Tabakrauchen verpönt.

Es ist offenbar, daß irgendeine Sünde die im trunkenen Zustande verübt wurde, als doppelt schwerwiegend beurteilt und bestraft wird. Das Verbot der Trunkenheit im islamischen Strafrecht wenn laut Regeln ausgeführt, könnte zum nachahmenden Beispiel für die europäische Gesetzgebung dienen.

Das Strafrecht verurteilt auch sehr strenge den Diebstahl, *(sariqa)*, folglich beobachteten europäische Reisende, daß in den orientalischen Geschäftsvierteln sehr oft die Läden der Händler zur Mittagstunde während der Abwesenheit der Eigentümer offen da stehen, und daß bloß ein Meterstab die Geschäftspause zur Kenntnis bringt.

Die Definition des Diebstahls ist folgende: Diebstahl begeht, wer einem andern einen unter Verwahrung gehaltenen und einen Wert von zehn Dirhem repräsentierenden Gegenstand im Geheimen wegnimmt. Der Diebstahl darf nicht mit jener Art der Entfremdung verwechselt werden, welche die islamische Theorie Usurpation *(ghasb)* nennt. Ein Usurpator ist nämlich derjenige, der eine Sache welche einen Verkehrswert hat, ohne Erlaubnis des Eigentümers, aber nicht im Geheimen, wegnimmt. Der Gegenstand der Usurpation kann sowohl eine physische Sache, wie auch ein Recht sein. Ein Recht usurpiert derjenige, der den Diener oder das Gut eines andern, ohne Zustimmung des Eigentümers zu seinem Vorteil vermietet.

Die islamische rechtliche Auffassung fordert von den Bürgern, daß sie auf ihr Vermögen entsprechend achtgeben und ihre Mitmenschen nicht in Versuchung führen. Deshalb wird die Entfremdung solcher Gegenstände, welche nicht entsprechend behütet *(hirz)* sind, nicht als Diebstahl betrachtet. Welcher Ort dem Bewachen geeignet ist, darüber arbeiteten die islamischen Juristen alle Einzelheiten aus.

Das Strafrecht verfügt, daß der Diebstahl durch Verstümmelung bestraft wird. Die Verstümmelung besteht darin, daß dem Diebe im ersten Falle die rechte Hand, im Falle wiederholten Diebstahls aber der linke Fuß abgehackt wird. Sollte der Betreffende auch zum dritten Male stehlen, dann ist er einzusperren und wird solange gefangen gehalten, bis er sich bessert. Es gibt Gelehrte, die behaupten, daß dem Diebe beim dritten Diebstahl die linke Hand, und beim vierten der rechte Fuß abzuhacken sei.

Die Hand des Diebes wird beim Unterarm abgehackt. Zum Beweis des Diebstahls ist entweder die Aussage von zwei männlichen Zeugen oder das Geständnis des Angeklagten notwendig.

Der Diebstahl ist nicht strafbar, wenn die Gattin von ihrem Manne, oder der Mann von seiner Gattin stiehlt, selbst wenn der Gatte sein Vermögen unter

besonderer Obhut hält, denn die strenge Absonderung des Vermögens der Ehegatten ist undurchführbar. Der Diebstahl ist ferner nicht strafbar, wenn der Sklave seinen Herrn, oder der Gast seinen Gastgeber bestiehlt.

Wegen Veruntreuung kann die Hand des Täters nicht abgeschnitten werden, weil bei der Veruntreuung die zum Begriffe des Diebstahls notwendigen konstitutiven Elemente fehlen. Auch kann sie wegen Ausraubung von Toten nicht abgeschnitten werden, weil die in den Gräbern untergebrachten Gegenstände nicht unter Obhut sind.

Nun muß ich auf eine eigentümliche Form des Diebstahls eingehen, nämlich auf den Straßenraub *(qat'ut-tariq)*. Der Straßenräuber wirkt ebenso wie der Dieb im Geheimen und kann nur dann für die Wegnahme eines Gegenstandes bestraft werden, wenn dieser unter Obhut war. Es ist die Pflicht des Fürsten und seiner Organe über die Sicherheit der Person und des Vermögens im Lande zu wachen, insbesondere auf den öffentlichen Straßen und in den Gemeinden. Da jedoch der Straßenräuber sozusagen hinter dem Rücken des Fürsten, beziehungsweise seiner Organe seine Umtriebe ausübt, kann die Tätigkeit des Straßenräubers als eine geheime angesehen werden. Die Strafe des Straßenraubes ist je nachdem, ob nur geraubt, oder mit dem Raube zusammen auch gemordet wurde, verschieden. Hat der Straßenräuber, ohne zu morden einen Gegenstand weggetragen, dessen Wert mindestens zehn Dirhem ist, oder wenn mehrere tätig waren, ebensoviel zehn Dirhem als Täter waren, dann ist die Strafe des Schuldigen: das Abschneiden der einen Hand. Hat er aber gemordet, ohne daß er auch geraubt hätte, dann ist der Täter hinzurichten. In diesem Falle wird die Todesstrafe als bestimmte und unabänderliche Strafe *(hadd)* des Straßenraubes bemessen. Dem Rechtsnachfolger der ermordeten Person steht das Recht, dem Verurteilten die Strafe zu erlassen oder sich mit ihm in ein Blutgeld auszugleichen *nicht* zu. Straßenräuber, die zusammen gehandelt haben, sind auch zusammen zur Verantwortung zu ziehen, denn sie halfen einander als Störer der, durch Gott festgestellten Rechtsordnung.

Die Hinrichtung des Raubmörders kann entweder mit dem Schwert geschehen, oder auch durch Kreuzigung, denn der Prophet sagte: »Wer raubt, der ist zu töten, wer mordet und raubt, der ist ans Kreuz zu schlagen.« Über dem zum Tode verurteilten und hingerichteten Straßenräuber wird nicht gebetet.

Bisher habe ich aus den *göttlichen Rechten* stammende strafbare Handlungen kurz besprochen. Die die *menschlichen Rechte* verletzenden strafbaren Handlungen können in zwei Hauptgruppen geteilt werden. In die erste Gruppe zählt man den Totschlag. In die zweite die körperliche Verletzungen. Die Strafen sind zweierlei Natur. Entweder wird die der verletzten Partei zugefügte Verletzung nach dem Prinzip: »Leben für Leben, Auge für Auge, Zahn für Zahn« mit einer ähnlichen Verletzung geahndet, oder der Schuldige wird angehalten, der verletzten Partei nach einem gewissen Skala eine Entschädigung zu leisten.

Nun nehmen wir der Reihe nach folgende strafbare Handlungen, die zu den menschlichen Rechten gehören.

Der Totschlag. Man unterschied anfangs dreierlei Arten des Totschlages, nämlich die absichtliche Tötung, *(ʿamd)* oder *(qatl)*, einen aus Irrtum begangenen Totschlag *(khatá)* und einen dem absichtlichen ähnlichen Totschlag *(shibhʾ-ʿamd)*. Später teilte *Abu Bakr Rázi* (starb 980) diese strafbare Handlung in fünf Klassen ein.

Die am meisten gebräuchlichen Definitionen des absichtlichen Totschlages sind die folgenden: Absichtlicher Totschlag ist, wenn jemand einen andern vorsätzlich mit einem Instrument tötet, welches vom Gesichtspunkt der Zerstückelung der Körperteile als Waffe gilt. Es muß zweifellos offenkundig sein, daß der Täter sein Opfer töten wollte und diesen Zweck auch erreicht hat. Es wird vorausgesetzt, daß jemand, der das Leben eines andern mit mörderischen Instrumenten *(álát dscháriha)* vernichtet hat, diesen töten wollte. Aus dem folgt, daß derjenige, der dem Leben eines Menschen nicht durch verletzende Instrumente, sondern in anderer Weise, zum Beispiel durch Erwürgen oder Vergiftung ein Ende macht, nicht die strafbare Handlung des absichtlichen Totschlages begeht. Die Folgen des absichtlichen Totschlages sind: die Strafe im Jenseits *(ithm)*, die Vergeltung der Verletzung *(qawadʿaynan)* durch eine ähnliche Verletzung, das heißt: der Tod des Mörders. Aber derjenige, der auf das Vergeltungsrecht Anspruch hat, kann es erlassen, oder kann sich mit dem Täter in einer gewissen Ablösungsumme vergleichen. Außerdem erleidet der Mörder den Verlust des Erbrechts *(hirmán ul-irth)*, denn der Prophet sagte: »Der Mörder hat kein Erbteil.«

Der Fall des dem absichtlichen ähnlichen Totschlages liegt vor, wenn jemand einen andern wohl absichtlich, aber mit einem Werkzeuge tötet, welches nicht zu den obenerwähnten Waffen — also Schwert, Messer, Pfeil, scharfer Stein — gezählt werden kann; zum Beispiel mit einem Stock, mit einer Peitsche, mit einem kleinen stumpfen Stein, und dergleichen. Die rechtlichen Folgen dieser strafbaren Handlungen sind: die Strafe im Jenseits und die Sühne *(kaffára)*, welche in der Befreiung eines moslimischen Sklaven besteht, wenn der betreffende Täter hierzu fähig ist, oder in ununterbrochenem zweitägigem Fasten, das Erbverbot und schließlich das verschärfte *(mughallaza)* Blutgeld zu Lasten des Täters und seiner Angehörigen *(ʿáqila)*.

Ich muß wiederholt betonen, daß das islamische Rechtssystem in ganz anderen Erdteilen und ganz anderen gesellschaftlichen, wirtschaftlichen Umständen Gültigkeit gewonnen hat, als unsere Gesellschaft im zwanzigsten Jahrhundert, und beruht auf den Quellen einer gottgefälligen Moralität, die den Verhältnissen angepaßt werden mußte.

Das bedeutet aber nicht, daß alle Mohammedaner durch lange Jahrhunderte das *Shariʿa*-Recht und alle seine Bestimmungen als gottesfürchtige Menschen sanft befolgt haben. Es entstand eine arabische, persische und türkische

Dichtung, die das Weintrinken verherrlichte und viele Khalifen, die Hüter des Rechtes waren, der Trunksucht ergeben die meisten der göttlich verbotenen Sünden verübten. Das prinzipielle Recht und das wirkliche Leben standen einander immer feindselig entgegen. Dafür bieten die Märchen der Tausend und einer Nacht ein wahrheitsgetreues Bild.

Das islamische Strafrecht sieht Strafen vor, auch für Verletzungen aus Irrtum oder verursachten Todschlages, der Maße aber gelinder sind. Es wird ferner die Notwehr geregelt. Der Prophet sagte: »Töte denjenigen den du bei deinem Vermögen triffst, also den Dieb im Hause.« Der Hausherr kann jede Person töten, die bewaffnet in das Haus tritt, wenn der Hausherr überzeugt ist, daß sie ihn töten will. Die Frau kann straflos jeden Mann töten, der ihr Gewalt antun will, wenn sie sich von dieser Gewalt nicht anders befreien kann. Wenn ein Mann in seiner Wohnung sieht, daß jemand mit seiner Gattin oder mit einer ihm nahe verwandten Frau *(maḥārim)*, selbst mit Zustimmung der Frau, Unzucht treibt, dann kann der, in seiner Ehre verletzte Mann den Mann und die Frau unbedingt töten.

Bei Streitereien aller Art muß nicht allerdings ein Tod folgen, sondern kann bloß eine körperliche Verletzung zustande kommen *(má dún'an-nafs)*. Dies kann absichtlich, aus Irrtum, oder infolge Nachlässigkeit begangen werden. Die Strafe der absichtlichen Körperverletzung besteht darin, daß die verletzte Partei die Verletzung durch eine ähnliche Verletzung vergelten kann.

Von den nicht absichtlich verursachten körperlichen Verletzungen sind diejenigen, welche die vollkommene Unbrauchbarkeit eines Körperteiles ergeben, mit einem für jeden Körperteil besonders mit einer bestimmten Summe festgestellten Schadenersatz am Vermögen zu bestrafen. Während für körperliche Verletzungen, bei denen die Brauchbarkeit der Körperteile nur vermindert, oder ein Schönheitsfehler verursacht wurde, eine schätzungsgemäße Entschädigung zu bezahlen ist. Die Kopf- und Gesichtsverletzungen werden im *Shari'a*-Strafrecht besonders behandelt, dafür gibt es genaue Instruktionen. Die wegen körperlicher Verletzung zu verhängenden Strafen kann der Richter solange nicht bemessen, bis die Wunde nicht geheilt ist.

Im islamischen Religionsrecht besteht das Prinzip der Vergeltung. Böses muß mit Bösem vergolten werden. Im Laufe der Zeit kamen die islamischen Gelehrten auf die Ansicht, daß es den Regeln der Vernunft gemäß nicht begründet sei, daß derjenige, der einen andern tötet oder verstümmelt anstatt der natürlichen Sühne — also Strafe — seine Tat durch eine Entschädigung am Vermögen, also Blutgeld gutmache. Daß diese Art der Vergeltung dennoch angewendet werden muß, kommt daher weil sie auf einer Verfügung Gottes im Koran beruht.

Um die Vorschriften des Vergeltungsrechtes verstehen zu können, müssen wir stets die Lehre des islamischen Rechtes vor Augen halten, daß das Recht des Menschen auf sein eigenes Leben und auf seine eigene körperliche

Unversehrtheit ein persönliches Recht sei und daß infolgedessen für die gegen das Leben und die körperliche Unversehrtheit des Menschen sich richtenden strafbaren Handlungen kein anderer, als die verletzte Partei, oder ihre Rechtsnachfolger zur Verantwortung zu ziehen können. Das moslimische Strafrecht hält bis aufs Äußerste konsequent an dem Prinzip fest, daß der Mensch selbst über seinen Körper verfüge. Deshalb muß die, auf dem Rechte der Vergeltung beruhende Todesstrafe des Mörders von den Rechtsnachfolgern des Opfers verlangt werden.

Die Rechtsnachfolger des Ermordeten haben in der Regel das Recht der Vergeltung *in natura* zu üben, das heißt den Mörder hinzurichten oder hinrichten zu lassen. Es wird aber nicht ihrem freien Willen anheimgestellt, das Vergeltungsrecht oder das Blutgeld zu fordern. Dazu daß, die Todesstrafe in Blutgeld verwandelt werden könne, ist die Einwilligung des Mörders notwendig.

Die aufgrund des Vergeltungsrechtes erfolgende Hinrichtung des Mörders kann nur durch das Schwert vollzogen werden, denn der Prophet hat gesagt, daß: »Das Vergeltungsrecht nur mit dem Schwerte geübt werden könne.«

Abgesehen vom gänzlichen Totschlag, also bloß körperliche Verletzungen, besteht ebenfalls das diesbezügliche Vergeltungsrecht, aber dieses kann nur innerhalb der Grenzen der Gleichheit *(musáwát)* geübt werden. Von diesem Gesichtspunkt aus betrachtet das Strafrecht des Islam den Mann mit der Frau nicht als gleichwertig. Hat daher die Frau die Hand eines Mannes abgeschnitten, so kann der Mann für diese körperliche Verletzung nicht wieder der Frau die Hand abschneiden, denn das würde gegen das Prinzip der Gleichheit verstoßen. Für die unter ungleichwertigen Personen vorkommenden Verletzungen ist der verletzten Partei das bemessene Blutgeld zuzuurteilen.

Bei der Vergeltung der körperlichen Verletzung ist es eine wichtige Regel, daß die Verletzung nur dann an dem Täter vergolten werden kann, wenn dies in der Weise, wie es der Täter getan hat, möglich ist. Dies ist das Prinzip der Ähnlichkeit *(mumáthala)*. Die Hand und der Fuß können nur beim Gelenk abgeschnitten werden, wenn auch der Angeklagte so gehandelt hat. Hat aber der Angeklagte die Hand und den Fuß des andern nicht beim Gelenk, sondern zum Beispiel zwischen Faust und Ellbogen entzwei geschnitten, oder ihm das Auge ausgeschlagen, dann kann die Verletzung nicht vergolten werden, weil es unmöglich ist, die Ähnlichkeit einzuhalten. Deshalb gibt es kein Vergeltungsrecht hinsichtlich des Knochens. Man darf nicht für die rechte Hand die linke, und für die linke die rechte Hand abschneiden, oder für einen Zahn des Oberkiefers einen Zahn des Unterkiefers ausschlagen. Zieht aber der Zahnarzt irrtümlicherweise statt eines schmerzhaften Zahnes einen gesunden, so kann er deswegen nicht zum Verlust des betreffenden Zahnes verurteilt werden, weil bei seinem Vorgehen die Kriterien der strafbaren Handlung nicht vorhanden sind; er hat aber ein Blutgeld zu bezahlen.

Der verletzten Partei steht das Recht zu, der Strafe, welche mit der von

ihm erlittenen Verletzung verbunden ist, zu entsagen, *('afw)* sich mit dem Täter zu vergleichen *(sulh)*, oder diesem die für Verletzung zugeurteilte Entschädigungssumme zu erlassen *(ibrá)*.

Wie erwähnt, kennt das islamische Recht den Begriff des Blutgeldes *(diyat, arsch)*, also den Gegenwert an Vermögen, welchen jemand als festgestellten Schadenersatz für vernichtetes Leben oder für verletzte Körperteil eines andern zu zahlen hat. Für das Leben ist das volle Blutgeld, für körperliche Verletzungen in der Regel nur ein Teil des vollen Blutgeldes zu bezahlen. Die zur Forderung des Blutgeldes berechtigte Partei braucht den ihr zugeurteilten Entschädigungsbetrag nur in Kamelen, in Silber oder in Gold anzunehmen. Die *Schari'a* entstand und entwickelte sich in einer in Naturalwirtschaft lebenden Gesellschaft. Das volle Blutgeld für einen Mann sind zehntausend Dirhem in Gold, das sind tausend Dinar, — in Kamelen aber hundert Stück. Für eine Frau entfällt von allem die Hälfte. Das Strafrecht stellt es genau fest, wie die als Blutgeld zu bezahlenden Kamele beschaffen sein sollen. Allerdings werden nur Tiere von höherem Werte angenommen. Das richterlich zugeurteilte Blutgeld ist nicht sofort fällig. Durch diese Verfügung will das *Shari'a*-Recht die zur Zahlung verurteilte Person davor bewahren, Vermögensstörungen zu erleiden. Das Blutgeld sowohl als Forderung, wie als Schuld geht auf die Erben über.

Das *volle* Blutgeld ist für solche menschliche Körperteile, von welchen es zwei gibt, dann zu bezahlen, wenn der Täter beide vernichtet hat. Also für Hände, Füße, Ohren und so weiter. Wurde von den doppelten Körperteilen nur einer vernichtet, dann hat die verletzte Partei auf die Hälfte des Blutgeldes Anspruch. Infolge der Wichtigkeit des Körperteiles, ist das *volle* Blutgeld für die Zunge zu bezahlen, wenn durch deren Verletzung die Sprache unmöglich wurde, ferner für solche Verletzungen des Gehirns, welche den Verlust der Vernunfttätigkeit verursachen. Laut Urteil des Propheten kann derjenige volles Blutgeld beanspruchen, dessen Schönheit vernichtet wurde.

Jeder Körperteil des Menschen wurde nach der Blutgeldsumme bewertet. Von all diesen Einzelheiten erwähne ich bloß, daß für jeden einzelnen Zahn die Hälfte eines Zehntels des vollen Blutgeldes zu bezahlen ist, also fünf Kamele. Es ist jedoch zu bemerken, wenn jemandem alle zweiunddreißig Zähne ausgeschlagen würden, die Summe des Blutgeldes hundertundsechzig Kamele ausmachen würde, also mehr als für den Totschlag. Der Prophet hat so verfügt, und die Juristen halten sich daran. Das Blutgeld des Sklaven bildet dessen faktischen Wert. Das Blutgeld für den Muslim und für einen tributpflichtigen nicht-Muslim *(dhimmi)* ist gleich.

Wenn bei körperlichen Verletzungen keine Absicht vorhanden war, sondern dieselbe durch Nachläßigkeit verursacht wurde, sorgten die moslimischen Juristen um dem Beschädigten entsprechende Summen zu beurteilen. Für die durch Tiere verursachten Schäden ist der Eigentümer verantwortlich. Auch

für körperliche Verletzungen, welche Tieren zugefügt werden, kann der Täter zur Verantwortung gezogen werden. Das Shari'a-Recht behandelt ausführlich die Verantwortlichkeit derjenigen, welche mit dem Schauplatz des Totschlages in territorialer Verbindung stehen *(qasáma)*. Die Bewohner der Gemeinde oder Ortschaft, wo ein Mord durch einen unbekannten Täter verübt wurde, sind moralisch verpflichtet, den Rechtsnachfolgern des Opfers das Blutgeld zu bezahlen. In Ungarn, während der osmanischen Besetzung, kam es öfter vor, daß ein Toter auf einer Wiese aufgefunden wurde. Für den Mord wurde die nächstliegende Ortschaft zur Rechenschaft gezogen. In vielen Fällen trugen die Bauern den Leichnam heimlich auf die Wiese des Nachbarn, um die Verantwortung in seine Schuhe zu schieben.

Das waren die Handlungen, deren Bestrafung bestimmt ist. Nun werde ich kurz die *unbestimmten* Strafen besprechen, die denjenigen aufzuerlegen sind, die eine Gott nicht gefällige Sache tun und deren Handlung nicht unter die, mit bestimmten Strafen verbundenen Handlungen gehört.

Die unbestimmten Strafen können wir als Züchtigung bezeichnen, und ihr Maß hängt von der Einsicht des Richters ab. Ihr arabischer Name lautet *ta'zir*. Es ist sprichwörtlich geworden wie weise die muslimischen Richter, die *Kádis* ihre salamonischen Urteile fällten. Früher genoß der weise Richter volle Freiheit, um aufgrund seiner eigenen Kenntnis und Erfahrung eine Entscheidung auszusprechen. Er war nicht an so viele Förmlichkeiten gebunden wie bei den, zu den göttlichen Rechten gehörenden Handlungen, und konnte als Beweis nicht nur die Zeugenschaft eines Mannes und zweier Frauen annehmen sondern auch die Aussage eines *einzelnen*, wenn dieser ein unbescholtener, wahrer, ehrlicher Mann war. Es ist bemerkenswert, daß die islamische juridische Praxis schon früh unterschied, und berücksichtigte die seelische Empfindlichkeit der zu bestrafenden Personen. Sie ging aus der Erfahrung aus, daß eine bloße Rüge des Richters eine ansehnliche Person viel tiefer beschämt, und von ihm als eine schwerere Strafe betrachtet wird, als eine körperliche Züchtigung, die einem verkommenen Händelfänger und Stänker zugefügt ist.

Die körperliche Züchtigung kann aus nicht weniger als neununddreißig Peitschenhieben bestehen.

Nehmen wir einige Beispiele worüber unbestimmte Strafen anzuwenden sind; zum Beispiel: die Ehrenbeleidigung. Darüber, was als ehrenbeleidigender Ausdruck zu betrachten ist, sind die Meinungen abweichend. Einige glauben, daß zum Beispiel wegen solcher Ausdrücke, wie »du Schwein, Ochs, Esel, Hund« — niemand bestraft werden könne, weil diese Behauptungen offenkundige Lügen sind. In Arabien hörte ich, wie mein Kameltreiber seine Tochter als »*bint kalb, bint inglisi*, Hundstochter, Tochter des Engländers« beschimpfte. Als ich ihn neugierig fragte: »Du bist ein Engländer, oder ein Hund?« — lachte er mir scherzhaft ins Gesicht.

Sagte jemand einem andern: du führst ein gottloses, schlechtes Leben,

du Dieb, Trunkbold, Wucherer — so ist hierfür die verletzende Partei zu bestrafen und kann der Strafe nur in dem Falle entgehen, wenn ihre Behauptungen offenkundig sind. Beweise aber, die er vorbringen will, sind nicht zulässig.

Der Moslim begeht eine strafbare Handlung wenn er dem Christen oder Juden sagt: du Ungläubiger, »Káfir«, denn die Anhänger von geoffenbarten Religionen sind nach dem islamischen Recht »Gläubige«, Schutzbefohlene.

Das Scharina-Recht war jahrhundertelang das nationale Recht des osmanisch-türkischen Reiches, welches über Ägypten bis zum Persischen Meerbusen reichte. Obwohl das Scharina-Recht die richterliche Unabhängigkeit sicherte, war es schwer die Gerichte vor den Übergriffen der Militärgewalt zu bewahren. Als die osmanisch-türkische Macht dem Vordringen der europäischen Regierungen weichen mußte, entstanden Reformen in der Türkei, die in Prinzip das Scharina-Recht beachteten, aber durch die türkische Regierung erlassene weltliche Gesetze seine Schärfe mäßigten. Die unter dem Sultan *Abdul-Medschid* in 1850 eingeführten Gesetze zeigen einen stark wahrnehmbaren europäischen Einfluß. Laut dieser Gesetze scheiden militärische Kommandanten aus der Verwaltung aus, und die Verwaltung des Reiches erfolgt durch die Richter, ferner die administrativen und Finanzbeamten. Im Laufe der Zeit neigte sich die öffentliche Meinung immer mehr der sogenannten Aufklärung zu, die ihr Muster im Europäisieren sah, und nach dem ersten Weltkrieg erklärte *Mustafa Kemal Ata Türk* die zum Kleinasien zusammengeschrumpfte, aber unabhängige, freie Türkei für ein konfessionsloses Reich. Die freie türkische Regierung verordnete den Gebrauch der lateinischen Schriftzeichen, anstatt der bisher üblichen arabischen, arbeitete neue Gesetze aus: das Strafrecht gestützt auf das italienische, das Zivilrecht auf das schweizerische. Die Religion wird als private Angelegenheit des türkischen Volkes, ohne Zwang, dem Gewissen jedes einzelnen Menschen anheimgestellt. Damit betrat das türkische Volk neue Wege und obwohl es stolz auf die glorreichen geschichtlichen Eroberungen und auch ungeheueren Opfer zurückblicken kann, geht einer friedlichen und blühenden Zukunft entgegen.

Die übrigen muslimischen Länder beharren auf ihrer geheiligten Überlieferung, obwohl der Islam überall seine staunenswerte Elastizität zur Schau trägt und die Muslime haben ihre religiöse Überzeugung mit allen neuzeitlichen gesellschaftlichen Errungenschaften in Einklang gebracht. Es erblühten selbständige muslimische Staaten, wie Marokko, Tunis, Algir in Afrika neben dem fortschrittlichen Ägypten, Pakistan und Indonesien — in Asien. In allen diesen Ländern ist der Islam die herrschende Religion und die kultischen Verordnungen werden wie vorher streng beobachtet.

Die kultischen Pflichten erstrecken sich auf die tunlichsten Handlungen der Gläubigen.

In all dem herrscht ein freiheitlicher Geist, der im Spruch ausgedrückt wird, daß der Islam zur Erleichterung und nicht zur Schwierigkeit des Lebens

geoffenbart wurde. Der Islam dient dem Menschen auf seinem Wege zur Seligkeit.

Laut göttlicher Verordnung ist allerdings das Essen von Schweinefleisch und von Aas — wie schon erörtert, das Weintrinken streng verboten. Wenn aber keine anderen Lebensmittel vorhanden seien, ist dieser Verbot aufgehoben, denn Erhaltung und Schonung des Lebens ist allerwichtig. — In diesem Sinne ist der Mensch nicht Sklave einer selbstherrlichen Klasse von muslimischen Priestern, — sondern steht unmittelbar persönlich dem Gott gegenüber.

Das Moslimsein besteht in dem Bekenntnis von: es gibt keine Götzen, es gibt nur den einen Gott, und dessen Bote ist Mohammed. *Lá iláha il alláh wa Muhammad rasúlilláh.* Das Aussprechen dieser Worte mit der Zunge und Glauben mit dem Herzen bedeutet die Annahme des Islam. Der Islam erkennt alle Boten oder Propheten, die Gott den Menschen zur Seligkeit gesandt hat, von Adam an, also auch Moses und Jesus. Mohammed ist der letzte Heilsbote Gottes, der die früheren göttlichen Sendungen bestätigt und gesiegelt hat. *Khátim ul-Anbiyá wa Khátam ul-Anbiyá.* Der letzte der Propheten und Siegel der Propheten.

Wie aus den göttlichen Quellen Rechtsnormen ausgearbeitet wurden, ebenso entwickelten sich die kultischen Pflichten, die allgemein verbindlich sind. Durch diese Pflichten entstand in der moslimischen Welt eine, das gesellige Leben organisierte Gestaltung, die sehr charakteristisch ist. Eine unumgängliche Pflicht des Moslims ist das Gebet fünfmal im Tage. Das Gebet kann nach bestehenden Vorschriften allein im Hause, oder in Gesellschaft in der Moschee, gewöhnlich am Freitag Mittag verrichtet werden. Das fünfmalige Beten soll den Gläubigen dafür erinnern, daß er als Moslim Pflichten gegenüber Gott, gegenüber sich selbst und gegenüber seiner Mitmenschen hat. Es entspringt einer moralischen Tunlichkeit. Das Gebet darf nur mit reinem Herzen und reinem Körper verrichtet werden. Dieses Gebot führte zu einer körperlichen Reinlichkeit, welche nach dem Verfall der antiken Reiche in Europa gänzlich vernachlässigt wurde. Muslime ließen sich nur dort nieder, wo fließendes Wasser vorhanden war und errichteten öffentliche Bäder, — viele von denen sind in Ungarn und auf dem Balkan noch heute in Betrieb.

Jedem Moslim, der körperlich dazu fähig ist, also gesund ist, wird die Pflicht des Fastens *(siyám)*, im Monat Ramadhan auferlegt. Da die Muslime die Zeit nach dem Kreislauf des Mondes berechnen, wechselt der Monat Ramadhan von Winter bis zum Sommer. Die Enthaltsamkeit von jedweder Speise und Getränk ist in den heißen Monaten eine Qual, — der Prophet wollte aber seine Anhänger zur Erduldung physischer Leiden gewöhnen, damit die seelischen Kräfte das Übergewicht behaupten können. Diese Weisung fand Ausdruck im Trost, daß man alle Erscheinungen mit Geduld ertragen muß, denn das Gute und das Schlechte, beide sind vergänglich. Wir lesen im Koran *»fainna ma'al'usri Yusran«* »Wahrlich, mit dem Schlechten kommt das Gute«.

Die Pflicht jedes, dazu fähigen Muslims ist die Pilgerfahrt nach Mekka, wo die Gläubigen aus aller Welt im Monat *Zulhiddscha* jährlich zusammen im Heiligtum ihre vorgeschriebenen Gebete verrichten. Die Pilgerfahrt ist das größte Fest des Islam und ein Symbol der allgemeinen Verbrüderung der Gläubigen.

Das islamische Religionsrecht — wie schon öfter erwähnt — regelt alle Handlungen und Zustände der Gläubigen. Es behandelt auch das Personen- und Familienrecht. Der Vater ist Haupt der Familie, aber die Ehefrau ist auch handlungsfähig, sie hat das volle Recht der Gerichtsstandhaft, sie kann klagen und verklagt werden, sie verfügt selbständig über ihr Vermögen.

Das traurige Los der Sklaven in der Welt, im Altertum, im Mittelalter und auch in der Neuzeit, fast noch während der Generation unserer Väter, hinterließ eine unlösbare Erbschaft auf die westlichen Gesetzgeber. Der Islam kannte die Institution der Sklaverei, brach aber die Spitze ihrer Unmenschlichkeit ab, indem er durch göttliche Gebote den Sklaven Rechte zusprach und sicherte. Ungläubige, die im Kriege gefangen genommen wurden, konnten zu Sklaven gemacht werden. Der Sklave besitzt nicht das volle Verfügungsrecht, wie der freigeborene Muslim, doch ist ihm der Geschäftsverkehr gestattet, bei Erlaubnis des Herrn. Der Sklave kann nur mit Genehmigung des Herrn heiraten, er darf aber seine Ehe scheiden. Die Freilassung der Sklaven *(kitába)* ist verdienstlich, wenn der Sklave darum bittet, und wenn er erwerbsfähig ist. Das Kind einer Sklavin von ihrem Herrn, ist frei, die Mutter des Kindes *(umm walad)* bleibt weiter Sklavin, darf aber nicht verkauft, verpfändet werden und wird nach dem Tode des Herrn frei.

Nun möchte ich über die Ehe im Islam sprechen, die zu so vielen Mißverständnissen führte. Das Religionsrecht erklärt, daß die Verehelung verdienstlich ist für den, der ihrer bedarf und die zur Ehegabe und zum Unterhalt der Frau erforderlichen Mittel besitzt. Der Freie darf zugleich vier, der Sklave zugleich zwei Frauen haben. Der Freie darf eine Sklavin nur heiraten, wenn er die, für eine Freie erforderliche Ehegabe nicht besitzt und für ihn as Lediger Gefahr der Unzucht da ist.

Das Recht bestimmt gewisse Eheverbote zwischen Verwandten. Jungfrauen können vom Vater oder Großvater zum Heiraten gezwungen werden. Deflorierte können nur dann verheiratet werden, wenn sie mündig und mit der Heirat einverstanden sind.

Der Ehevertrag wird durch Vermittlung eines Brautanwaltes *(walí)* und zweier Brautzeugen geschlossen. Es ist verdienstlich in dem Ehevertrag die Ehegabe *(mahr)* genau anzugeben. Es ist Gebrauch, daß von dem bedungenen *Mahr* nur ein Teil sofort vom Bräutigam bezahlt wird, der Rest ist im Falle der Scheidung zahlbar. Der Ehemann ist verpflichtet allen seinen Frauen gleiches Recht zu Teil werden lassen. Er muß alle gleich lieben, wenn aber er verreist, so läßt er das Los über die Begleiterin entscheiden.

Ist die Frau ungehorsam, so hat der Mann Ermahnungs- und Enthaltungsrecht, bei fortgesetztem Ungehorsam Züchtigungsrecht.

Dem Ehemann steht die Scheidung *(talaq)*, Entlassung zu. Das Talaq erfolgt durch Aussprechen einer Formel wie: »ich habe dich entlassen« *(talaq-tuki)*, oder durch irgendeinen Ausdruck, der auch den Sinn einer Scheidungsformel haben kann. Mit der entlassenen Frau kann der Mann wieder in die Ehe eintreten und zwar ohne neuen Ehevertrag, wenn ihre Wartezeit *('idda)*, eigentlich nach den Perioden, noch nicht abgelaufen ist. Ist die Wartezeit abgelaufen, so ist ein neuer Ehevertrag nötig.

Entläßt ein Mann seine Ehefrau zum drittenmal, so kann er sie nur wieder heiraten, wenn sie nach der Scheidung mit einem andern Mann begattet und wieder entlassen wurde. Mit dieser Verfügung versuchte der Prophet die jähzornigen Ehemänner zur besseren Einsicht und Versöhnlichkeit zu bewegen.

Der nicht endgültig entlassenen Frau schuldet der Ehemann Wohnung und Unterhalt. Der endgültig entlassenen schuldet er beides, wenn sie schwanger ist, und nur die Wohnung wenn sie nicht schwanger ist.

Wenn ein Mann das *Zihár* ausspricht, das heißt: »du bist mir, wie der Rücken meiner Mutter« — der muß eine Sühne leisten, ehe er das eheliche Leben wieder aufnimmt.

Das Kind der entlassenen Frau zu pflegen und zu erziehen hat die Mutter das größere Anrecht, und zwar bis zum Ablauf des siebenten Jahres.

Die Lösung durch Übereinkunft findet statt, wenn die Frau sich von der Ehe durch Zahlung einer bestimmten Vermögenbetrages an den Mann loskauft. Sie hat freie Verfügung über sich und zu einer neuen Ehe.

Die Vielweiberei im Islam ist keine Pflicht, sondern eine Möglichkeit, wenn sie dem Manne die materiellen und geistig-seelischen Zustände zulassen. In naturalwirtschaftlichen Verhältnissen bürdet die große Zahl der Kinder dem Familienhaupt keine Lasten auf; im Gegenteil die Kinder konnten früh erwerbsfähig und der Familie von Nutzen werden. Die Vielweiberei und der größere Kindersegen hat die durch ständige Kriege bedrohte muslimischen Völker von dem Aussterben bewahrt. Heutzutage als der Industrialismus auch den islamischen Orient im Banne befangen hat, ist die Vielweiberei im Islam selten geworden.

Ich kann über das Sachen und Obligationsrecht nur flüchtig sprechen. Das mohamedanische Recht schreibt vor, daß Austausch von Geld und Silber gegen einander und Austausch von Lebensmitteln gegen einander als Wucher *(ribá)* gilt; und ist verboten. Durch dieses Verbot wären Bankgeschäfte, also Anleihen gegen Zinsen unmöglich. Es ist jedoch gestattet Gold gegen Gold und Silber gegen Silber in gleichen Beträgen bei sofortiger Lieferung zu verkaufen, auch Gold gegen Silber in ungleichen Beträgen bei sofortiger Lieferung zu verkaufen. Es beweist die Elastizität des Rechtes, daß heute Bankgeschäfte im islamischen Orient blühen.

Am wenigsten ausgebaut blieb im Islam das öffentliche Recht. Dies folgt aus der eigenartigen Entstehung und frühen Entwicklung der islamischen Gemeinde. In Medina in der Gemeinde Mohammeds herrschten einfache Verhältnisse. Ihr Oberhaupt war der Prophet, ihm gegenüber stand die Masse der Geleiteten. Nachdem die Lehre des Islam die arabischen Stämme nun in ein siegreiches Heer verwandelte, eroberten sie die fruchtbaren Nachbarländer und wurden Herrscher der sich ergebenen nicht-Muslime. Es entstand auch im Islam die Teilung der Menschheit in zwei Gruppen: Gläubige Muslime und nicht-Muslime. Die Welt wurde daher als das Gebiet wo das Recht des Islam volle Gültigkeit genießt als: *dár ul-islám*, — und dem gegenüber als Gebiet des Krieges: *dár ul-harb* aufgefaßt, wo man nach Tunlichkeit mit Gewalt oder Vergleich Frieden stiften kann.

Viele Feinde des Islam waren Götzenanbeter, für diese standen bloß zwei Wege offen. Entweder erkannten sie den Islam an, oder wurden getötet. Die Christen und Juden, als Besitzer von geoffenbarten heiligen Schriften, wurden als tributpflichtige, vertragsmäßige Bürger geduldet. Diese Bürger wurden als Schutzbefohlene betrachtet und entrichteten bestimmte Steuern, einen festgesetzten Betrag als Abgabe nach dem Grundbesitze, der laut Verordnung im Koran eingetrieben wurde. Sie waren aber vom Kriegsdienst enthoben. Die Muslime waren bloß zur Entrichtung der Armensteuer verpflichtet, der ungefähr zweieinhalb Perzent des reinen Einkommens ausmachte. Der Schutz der den Christen und Juden gewährt wurde, und das aus diesem Schutz und Tribut fließende Einkommen des Staates schien nachteilhaft für die Verbreitung des Islam. Um der höheren Besteuerung vorzukommen, traten viele Christen und Juden in Massen zum Islam über. Es wurde gefürchtet, daß infolge der Massenbekehrung die Schatzkammer erheblichen Schaden erleiden wird und viele sahen es tunlich dieser Bekehrung vorzubeugen. Der Khalife *Omar II Abdul-Aziz* (st. 720) wehrte sich gegen eine derartige Sperre und erklärte: »Gott hat mich zum Verkünder des Islam und nicht zum Steuererheber auserkoren.«

Es entsprang der, durch die feurige Botschaft des Korans entfachten Begeisterung allen Menschen die Seligkeit die der Islam versprach, beizubringen. Das wurde durch den Krieg gegen die nicht-Muslime in der Tat übersetzt. Der Krieg gegen den Feind wurde das Loswort der Araber und im Krieg entstand die Notwendigkeit einer Disziplin, ein geordnetes Zusammenwirken aller Beteiligten zu dem die Grundform im islamischen Gebet dargeboten wurde. Alle gehorchten einem Vorbeter, der festgesetzte Bewegungen ähnlich der militärischen Befehle laut anordnete. Der Koran gebot (Sure IV.62) »Ihr die da glaubt, gehorchet Gott und gehorchet dem Gesandten und den Befehlshabern aus euerer Mitte.« Nach dem Tode des Propheten übernahmen die Verwirklichung der Gesetze die, von der Gemeinde gewählten Nachfolger, die Khalifen, die wohl Leiter der Gemeinde in *allen* rechtlichen Angelegenheiten waren. Der

Khalife war Führer, Befehlshaber der Gläubigen *(amir al-mu'minin)*. Im Laufe der Zeit kam dieser Titel und die damit verbundene Funktion an verschiedene Persönlichkeiten, die oft einander feindselig gegenüber standen. Die Schiiten hatten ihre eigenen von Vater auf den erstgeborenen Sohn übertragenen *Imame*. Die Sunniten anerkannten die Familie des Omayya, nachher der Abbassiden als Oberhaupt. Als das große arabische Reich politisch in mehrere Fürstentümer zerfiel, huldigten die Gläubigen mehreren Khalifen. Im arabischen Spanien setzten die Omayyaden ihre Herrschaft fort, in Baghdad herrschten die Abbassiden. Amtlich wurde als Khalife diejenige Persönlichkeit anerkannt, deren Name in dem Freitaggebet öffentlich huldvoll erwähnt wurde. Einige Fürsten fügten den Titel Khalife zu ihrem Namen bei, als Zeichen des Erfolges ihrer Waffentaten als *Khalifat Ullah* gestützt auf Koran 38.26., also nicht Nachkomme des Propheten, sondern Khalife von Gottesgnaden, gestützt auf den Koransatz (38.26.).

Mit dem Sturz des Khalifats durch die Zerstörung von Baghdad, seitens des Tatar *Hulagu Khan*, floh der Khalife nach Ägypten und fand Obhut unter den Mamluken, bis der türkische Sultan *Selim I* in 1517 die Mamluken zerschlug und den Khalifen als Ehrengast nach Konstantinopel führte, wo er in 1538 starb. *Sulejman* der Große nahm bloß das Prädikat: Hüter der zwei Heiligtumer *(Khádim al-Haramain)*, Mekka und Medina an. Dadurch betrachtete die islamische Welt den türkischen Sultan als Khalife. Es entwickelte sich eine Theorie über das Khalifat, welches derjenigen Person zufällt, die aus der Sippe Koreisch stammt, die die Reliquien des Propheten, die Fahne, den Zahn, ein Büschel Haar und den Mantel besitzt, ferner als mächtigster Herr der Moslimen, Hüter der zwei Heiligtümer ist. Von diesen Eigenschaften besaß der türkische Sultan bloß die fragliche Herrschaft über die heiligen Städte. Die Reliquien wurden in der Moschee von Eyub in Konstantinopel aufbewahrt. Nach dem ersten Weltkrieg verloren die Türken Arabien, und *Mustafa Kemal Ata Türk* errichtete auf den Trümmern des Osmanenreiches eine Republik die mit dem Sultanat und Khalifat endgültig aufräumte. Wer konnte nun das edle Amt, Leiter aller Gläubigen übernehmen?

Als ich im Jahre 1935 in Mekka das Zelt des arabischen Königs *Abdul-Aziz ibn Saud*, Vater des gegenwärtigen Königs, betrat um ihm zur glücklichen Rettung von Meuchelmördern zu huldigen, sprach ich ihm, zum allgemeinen Staunen der anwesenden Stämmehäuptlinge als *amir al-mu'minin*, »Leiter der Gläubigen« an, — da doch *er* tatsächlich Hüter der Heiligtümer, Wächter der Straßen und Vollstrecker des islamischen Religionrechtes sei. Er erwiderte meine Ansprache mit einer königlichen Geste, bot seine Gastfreundschaft an, die mir tiefe Einsicht in die Verhältnisse Saudi-Arabiens gewährte.

Gastfreundlichkeit ist dem Araber und jedem Mohamedaner eine menschliche Pflicht, die er mit der größten Sorgfalt und Geduld ausübt.

Islamic Law

by

JULIUS GERMANUS

The author gives first a historical survey of the unification of the sometimes dispersed Arab tribes and the emergence of the Ottoman Empire. In this Empire some States were leading, as is known, in several sciences, but law was not studied at all. The paper describes Mohamed's role in the rise of Muslim law and the emergence of the Koran as the source both of religion and law. The main rules of human co-existence were evolving also in the Islamic world. The Koran and traditions jointly constitute Islamic law and jurisprudence which came to develop over subsequent centuries. This science is one of the most peculiar products of human intellect.

After this historical survey the paper outlines the four main legal schools, compares their principles, then discusses the division of human acts by religious philosophers. The paper deduces from this the categories of punishable acts and deals in detail with Islamic criminal law. In this context it discusses the civil law effects of punishable acts, issues of civil law liability and of compensation.

Lastly, the paper sums up briefly the development and transformation of the law in the period after the disintegration of the Ottoman Empire. Among the countries adopting Muslim law, Turkey is pointed out which adopted, in the course of modernisation, Italian criminal law and Swiss civil law. The other, mostly Arab States retained their old law, adapting it to the demand of modern times.

The concluding part of the paper treats briefly the rules on persons, on family law and on matrimony; it touches upon also the law of things and of obligations. Public law is mentioned as a little developed domain of Islamic law.

Le droit islamic

par

JULES GERMANUS

Pour commencer l'auteur donne un aperçu historique sur l'unification des tribus arabes jadis dispersés et sur les circonstances dans lesquelles l'Empire de l'Islam s'est formé. Il est généralement connu que dans certains pays arabes de cet Empire différentes branches de science ont été cultivées sur un niveau très élevé, mais le droit et la science de droit ont parfaitement fait défaut. L'étude démontre le rôle joué par Mahomet dans la formation du droit musulman ainsi que les conditions contribuant à ce que le Coran a pu devenir la source et de la religion et du droit. Les règles principales de la coexistence humaine se sont successivement développées. Le droit et la science juridique islamics ont été constitués du Coran et des traditions passant au cours de siècles par plusieurs stades d'évolution. Cette science est l'une des plus particulières de l'esprit humain.

Après l'esquisse historique l'étude fait connaître les quatre principales écoles juridiques, fait comparaison entre leurs principes de base, puis elle donne une description des actions humaines sur la base d'une classification établie par les philosophes de la religion. C'est de là qu'elle déduit les différentes catégories des actes punissables et développe ensuite d'une manière détaillée le droit pénal islamic. C'est dans cette connexion que l'auteur traite les conséquences de droit civil des actes punissables, ainsi les questions de la responsabilité civile et des dommages-intérêts.

Dans la partie finale l'auteur s'occupe de l'évolution, c'est-à-dire de la transformation du droit islamic dans la période d'après la dislocation de l'Empire Osman. Parmi les pays suivant le droit islamic il met en vedette la Turquie où lors du processus de modernisation la réception du droit pénal de l'Italie et du droit civil de la Suisse a été réalisée. Les autres pays, dans leur majorité arabes, ont maintenu leur ancien droit qui cependant manifestait une souplesse remarquable en face des exigences des temps modernes.

Pour finir, l'étude fait brièvement mention du droit des personnes, du droit de la famille, de l'institution du mariage, du droit des choses ainsi que du droit des obligations. Le droit public y est effleuré seulement en tant que domaine encore peu développé du droit islamic.

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Trends and Problems of the Development of Law in Hungary

by

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The author starts with stating that legal evolution in people's democratic Hungary has reached the second stage of codification and law-making. He analyses the number of statutes, the ratio and relationship between Acts and Decrees. The problem of "unlawful" normative Acts is also dealt with. The legislative phases starting in 1967 respectively in 1970, the nature of new statutes, the combination of earlier and recent elements in these statutes are analysed. The author pays particular attention to the correlation between stability and mobility in the new legislative phase and the social, legal-technical reasons accounting for the changes ensued.

Next, the author surveys the principles underlying topical tasks. He points out the importance of collecting experiences for the legislative process, and of checking the law hitherto enacted. A comparison is made with the pre-liberation law and a thorough analysis is made of the related problems.

Tthe author deals also with the problem of unification of the laws of socialist countries and the attempts made in this direction. He points out that economic integration demands both national and international legislation. In this context the state of harmonization in socialist laws and the nature of this process is analysed. He comes to the conclusion that it is the duty of jurisprudence to lay the foundations for unification and for further harmonization. The problem of the comparison of socialist legal systems is likewise examined; in this context the function of law comparison in law-making and law application is discussed.

There is a period in the development of any law where analysis and appraisal of the prevailing situation of the law cannot yet be considered wholly historical, and therefore its analysis is not the task of legal historians: but that of the theory of law. More explicitly, the general characterization of the law of a given country and at the same time the characterization of a historically defined phase or state of the development of law, may be considered coming within the sphere of what is called the applied, or not wholly general part, of the theory of law. We shall try this in the following, with all the advantages of this comprehensive character, following from the legal theoretical approach, however, at the same time with all the superficiality concomitant with this approach.

The analysis of the development of law in Hungary after the Liberation has already been attempted on several occasions. Essentially, the analysis established that the first revolutionary phase of the development of popular democratic law passed off between 1945 or rather 1949 and 1961 coincided with the first phase of popular democratic development of society. Breaking

away from the earlier law, opposition to the continuity of law, as regards both contents and substance, and the creation of a wholly and radically new legal system was characteristic of this first phase. The first "codifying" phase of the initial period created new Codes, partly in new fields of law (family law, labour law, co-operative law), partly in fields where new codification became necessary (civil law). In other fields new Codes superseded the earlier ones (criminal law, procedural laws). Finally new quasi-Codes, or occasionally called small Codes, were promulgated in certain particular fields or branches of constitutional law and administrative law. Thus though not completely, but overwhelmingly — even in its appearance — a new Hungarian law was born, viz. the popular democratic Hungarian law.

By now we have already entered the second phase of the development of popular democratic Hungarian law. In this phase, now lasting for about eleven to twelve years, the development has undergone periods of a fairly general character, yet being well distinguishable, and clearly outlined. Of these, we shall speak forthwith. Still before proceeding to their discussion we have to take a glance at the external façade of this development. How has during these phases the proportion between the categories of sources of popular democratic law developed?

First, the proportions of the particular types of sources of law have been stabilized during the latter ten to twelve years. However, at the same time the number of new sources of law has also dropped. As regards the ratio of the sources of law, earlier the proportion between Acts Law-decrees and Decrees of the Council of Ministers was 1 : 9 : 12, whereas in the phase now under study the ratio has changed between all legal rules to 1 : 6 : 8. Fundamentally legislation has not become livelier, the number of new enactments remained under ten throughout the period. This can or must actually be regarded as natural. A working system has become established in Parliament which does not permit the passing of a larger number of enactments, which perhaps is not even regarded as its task. Incidentally this is more or less the number of enactments passed by the legislatures in most of the socialist countries. Expediency suggests the division of the Law-decrees into two groups: about 10 to 20 Law-decrees yearly deal with the ratification of treaties or international agreements, and another 20 to 40 with domestic matters. Finally the average number of the Decrees of the Council of Ministers is 50 to 60 yearly. These numbers and ratio must be considered normal not merely for their permanent character, but also from the aspect of legal system. With more or less modifications there is a certain regularity in the legislation of the socialist countries, where the ratio have developed in a similar manner; i. e. in addition to the substantial priority of Acts, also the proportion between Law-decrees and Decrees of the Council of Ministers has been quantitatively stabilized.

This must be emphasized especially, because in all appearance the complaint on account of the quantitative insufficiency of legislation seems to be unfounded. Obviously in socialism, the new social and political structure has involved that although codification will remain an essential but not always predominant part of socialist legislation, at least not in a quantitative sense. This statement affects the demand for the determination of the subjects of legislation indirectly only, which has not been superseded by recent development. Still the solution of the substance of this problem, notably what should constitute the subject-matter of legislation, comes within the province of constitutional law.

The present phase of legislation in Hungary may be considered so that in its course concerning the notions, at least as far as the principal sources of law and their mutual elations are concerned, a more or less permanent opinion has developed. Thus the Acts of Parliament, or within their scope Codes, have remained substantially the primary, fundamental sources of law. Obviously neither the characteristic feature of socialist law has changed, that a demand for codification and for the statutory regulation of the fundamental legal relations still prevail. As regards the ratio of the sources of law, no change can be expected for the time being, but rather a more definite emphasis on the assertion of the characteristics of the contents of the sources of law is to be expected. It would be expedient to define in a more clear-cut way the character and contents of the Law-decree, and in particular draw a line between them and Acts. A more recent and perhaps even more important task is the delimitation and distinction of the substance and contents of the Decrees of the Council of Ministers from the Acts of Parliament and Law-decrees. In our opinion the theoretical studies of the sources of law should in the first place be focussed on these problems.

Still within the structural problems of the system of sources of law the proportion between Acts and their enacting clauses (orders) remains important and can, even in principle, be more easily approached than before. Presumably there is a still justified criticism to the effect that the proportion of enacting orders is still too high in Hungary. Where there would be no possibility of any enacting orders, tendencies may be seen to promulgate pseudo-enacting orders which put on the guise of official opinions with a pretension of official obligatory normative character, though having been issued by organs without any authority to promulgate normative rules. We shall refrain here from going into a detailed analysis of this problem, still we call attention to this phenomenon as to one which has become a characteristic feature — though being not a positive one — of the present phase of development. As a matter of fact, there are tendencies, and incidentally not only in this country, to bridge the gap between the source of law and the legal practice serving its enforcement with pseudo-norms in the guise of a normative cloak (e.g. the opinion of the

competent Ministry). It is worth to call attention to the tendencies guiding the judicial practice of the courts of higher instances towards a law-making (normative) function in the form of decisions of the plenary session of the Supreme Court. Although, on the whole, this tendency is beginning to take a normal shape, the so-called normative opinions of the organs of state administration cause greater risk. Still it can be stated that in Hungary there is a permanent tendency to extend illegally the scope of normative acts, and at the same time to take decisions directly relying on normative sources, avoiding thus any decisions requiring mental-logical efforts and applying the source of law of a higher degree without relying on any special source of law of the above-mentioned category.

Is not this characteristic feature attached in a more general form to legal thinking in Hungary? Earlier, in the age of judge-made Hungarian private law, those in charge of applying the law had to proceed as decreed by the Swiss Civil Code in cases where the judge was unable to find any written law. According to Section 1 of the Swiss Civil Code in such and similar cases those in charge of applying the law were bound to act as if they were the legislators themselves. Has this element of legal thinking survived, i.e. the tendency that law administrators are as a rule looking for a model of decision, in principle, or trying to create such a model themselves? Certainly an element of this type has survived, still there is another element too, that is refraining from taking an original, independent stand, i.e. from accepting responsibility. Presumably in the case outlined above rather the symptoms of this latter element are manifest, symptoms which are by no means independent of this phase of transition. The law administrator in whom the new legal way of thinking, the new principles of law have not yet rooted deeply enough and who is conscious of the political significance of his legal decisions and, at the same time of the uncertainty associated therewith, will rely on a superior act, i.e. on a normative rule. This circumstance in all events calls attention to the importance of legal education, and at least to the same extent to that of social-political education. On this consideration, the guiding principles of legal policy provide a transition and useful assistance, which in each phase of social development will help the legal practitioner in overcoming the difficulties (Decision 14/1973 of the Presidium dealing with the legal political principles of the administration of all branches of law both from the aspect of criminal law and civil law.)

II

This new phase of legal development, which has been earmarked by us earlier as the second phase of codification, began in 1961, or more precisely, the first phase closed in 1961. This was followed by a certain phase of transition,

then in 1967 the new phase became definitely outlined, in which two smaller periods may be distinguished. From 1967 onwards, for a period of three or four years, civil law underwent a certain type of transformation. This period has not yet come to an end, it is somehow associated with the new economic mechanism, with the introduction of the new system of economic management, as its legal reflection. One of the characteristics of this phase was that it was started by the promulgation of new Decrees of the Council of Ministers, and had repercussions on the Civil Code, in a transient form, merely by a regulation by Law-decrees. Of course this set in motion to a high degree the legal system influencing also other fields of law first of all economic relations in the widest sense of the word. The economic and civil law phase was followed by the second phase, from 1970 to 1972, characterized by changes in the political superstructure: the new electoral laws, the amendment of the system of Local Councils, the reform of the Judiciary and the Procurator's Office, and finally, as the keystone of this legislation, the amendment of the Constitution. Incidentally this change is still in progress, implying a number of other amendments of legal rules of vital importance. Thus in the beginning a new Code of Criminal Procedure was enacted, and a number of other Codes are being prepared.

In this second phase of development obviously the amendment of the Constitution towers above all other items of legislation, just as the new 1949 Constitution of the People's Republic did in the first phase. There is no need here for a special appraisal of this Code. Still we have to make mention of it in so far as it is characteristic of this whole phase of legal development. As a matter of fact the amendment, as it is known, preserved all that had been characteristic of the building of socialism, all that were in their foundations new institutions of the socialist type in the former Constitution. Still whereas it maintained the basic institutions the amendment developed further all that could be expressed in a new way and on a higher level in compliance with the new social, political and cultural achievements. This however did not amount to any — even relative — interruption of legal continuity. Though the amendment of the Constitution did not mean any radical change in the system itself, although in certain institutions of law such changes took in fact place. The amendment of the Constitution had in certain sense the character of a reform, it connected the maintenance of the past with the necessary new which was characteristic not only of the general transformation of Hungarian legal development, but also of the transformation of our social development as a whole.

A general conclusion may be drawn therefrom, that the characteristic feature of the legal changes in the transition from the first to the second phase of socialist development consists in the survival of the original socialist foundations with the inclusion therein of such modifications that have become necessary, i.e. some sort of a reform of the established socialist legal system.

This thesis is, as far as its contents are considered, generally true, still at the same time it leaves the possibilities of the many varieties of formal solutions open: the amendment of laws similarly to that of the Constitution or a complete redrafting of them (enactment of new Codes) or amendments by way of supplementary laws. This is, however, a question of the methods of formal solution.

Whereas it is difficult to define what is the new element in the law of this phase, it is easy to put smoothly this modified system into legal practice. While, on the one hand, the recognition of the character and significance of the changes may confront us with problems, on the other hand, judicial practice must not endure any heavier shocks in solving eventually new problems. At the same time among lawyers a certain feeling of the continuity of law begins to prevail as far as popular democratic law is concerned. This has, of course, both its advantages and its disadvantages as compared with the first phase of development. Propaganda had as its primary task — either directly in association with the creation of the new socialist law, or in wake of it — to make the public conscious of the quite new features and elements of the new law, i.e. to stress the social and legal significance of the change, lest a false idea of legal continuity, remain predominant. Put it in an other way, the prevalence of the mobility of law was to be emphasized in the first place, up to the revelation and permanent ideation of the most radical changes. Whereas with respect to the second phase, the calling of attention to changes cannot be omitted, social aspects give priority to the thesis, that these changes are more or less brought about by the normal development of law, as a rule not in a radical form by the introduction of new institutions (although there were examples also of this, thus e.g. the changes made recently in the land register, which though had had their antecedents). This trend has been reinforced also by legal policy in its generality since the social demand for stability is coming more and more to the fore, in particular with regard to law, especially to the increase of the rule of law.

Incidentally as far as the often arising problems of the relations of stability and mobility are concerned, in our opinion this question has to be raised on two levels. Legal mobility or stability in the strict sense of the word can be applied exclusively to the sources of law, to their stability or mobility, to their validity for longer or shorter terms. On another level, viz. on the level of social property, the question of stability or mobility means whether the change in the social conditions is slow or rapid. It appears, as if in the relations first mentioned, namely in the formal-external relations, stability will gain a primordial significance also in the socialist system. After the new system has become established and has taken shape in all likelihood changes void of social significance, or of slight significance only, will have to be avoided, changes consisting merely in textual modification, i.e. changes offering only a new, perhaps

better wording as before, should rather be omitted except where the improvement of the text is worth the drawback involved by the change.

The situation is an altogether different one on the second level of stability and mobility, i.e. on that of the society in the essential sense of the word. Here changes in the provisions of law are inevitable as soon as changes have taken place in the social conditions. Here exaggerated stability would eventually lead to social rigidity and set up barriers to social development. Here we should like to refer to an example. If in the field of the Code of Family Law introduced about twenty five years ago, shortcomings of merely legal or technical character are displayed, without any essential changes in social conditions, then in our opinion the principle of stability may have priority over the principle of mobility. If, however, changes have taken place in essentially important social relations, mobility must prevail. This of course presupposes two extreme cases, whereas in life such extremities rarely occur.

Earlier, while dealing with socialist codification, we have made the statement that on average in every fifteen to twenty years a socialist Code will be superseded by a new one. This is valid also for Hungarian codification, justified by the relatively rapid changes in socialist social conditions. Perhaps not always the rapid development of the contents of social conditions, but rather the social transformation of the structure of conditions calls for or involves a new legal regulation. All that has been said before in connection with the supervention of changes in later phases of stability and mobility, holds true also with respect to these changes. On this understanding the cause of the changes must not be sought for in possible qualitative shortcomings of the Codes.

In principle and in general the temporal setting of the changes is a similar one as regards the legal system as a whole or the larger part of it, i.e. also as regards the other provisions of law, because the overwhelming part of the law follows the codes, or the other way round, the modification of the Codes involves the modification of the other legal rules. As a matter of fact most of these provisions are merely enacting clauses or orders to the Codes. What may be assumed at most is that for provisions of law of lower order, where eventuality plays a greater role, the above-mentioned period may be shorter, i.e. the speed of the relative incidence of these provisions may even be greater. Since, however, these provisions mostly follow in the wake of Codes, this shift in the temporal order is not significant.

The conclusion which may be drawn from what has been set forth before is to the effect that the decrease of changes for formal reasons should run parallel to changes due to social causes. In this respect we may perhaps insist on a more rigorous differentiation between the causes of formal and substantial changes, and accordingly on the increase of the external or formal stability, by preserving the socially essential mobility.

Among the social factors of a permanent character actuating codifica-

tion we have to include the trait of the socialist legal systems originating in the social division of labour of state organs, that a sharp line is to be drawn between legislation and the application of law; more so than in the bourgeois systems of law. In principle, the socialist legal systems demand from the application of law the rigorous implementation of legislation, the strict adherence to it in accordance with the principles of legal policy. (The organs in charge of the application of law . . . are bound to observe the provisions of law, and cause others to observe them.) This guides development in a direction that written law should in all cases be timely, and applicable in all circumstances.

III

One of the fundamental problems of recent Hungarian popular democratic legal development is the reformation of the prevailing law. More closely, the problem here is, whether the new law superseding the former one constitutes a substantially new law, or only one superseding in time and in form the earlier. Or put in another way, the question is, whether earlier Hungarian law has in fact had its time, has become socially obsolete, or has it been simply replaced.

As is known, Hungarian legislation following upon the enactment of the new Constitution of 1949 had as its characteristic feature the following of the Soviet example. For the Hungarian People's Republic, without any immediate experiences in socialism and relying merely on the experiences of a few months of the Hungarian Soviet Republic in 1919, the only possibility was to follow an example, in this case that of the Soviet legal system. This implied all that was substantially socialist, however, at the same time also what was specifically Soviet. In the development of the new system the insertion of radically new elements was required all the more because as was commonly known the Hungarian legal system before the Liberation had not excelled by its democratic traits, including a fairly large number of feudal elements. Sources of law enacted after 1867, were even at the time of their birth averse to democratic solutions, and, in particular in their form during the Horthy era, these sources of law were lagging far behind the European bourgeois democratic standards. It is only in this *milieu* that we can assess the extent to which Soviet law has been adopted, and even come to the conclusion as if in this adoption (viz. in the adoption of specifically Soviet elements) we might have gone too far, because in this far-reaching adoption the tendency to withdraw radically from the too backward state might also have had a part.

In the present course of development, i.e. in the second period of codification Hungarian legislation is confronted by a triple task. First of all, the actual social problems must be solved, that is, the best legal form of their solu-

tion is to be found. Secondly, we have to look for guide-lines, if any, for this task, i.e. we have to look round for experience we may exploit. In our opinion, in the first place there are the experiences of socialist societies. The formerly exclusively Soviet experiences have been enriched by those of the other socialist countries: the store of profitable examples has thus become richer. Finally, we have to decide whether in our first codifications we did not go too far in searching for the new, and did not avoid solutions the only fault of which was that they had not been born under the new conditions, yet they could be used under our conditions, as well. The sequence which we have set up here is but one of principle, in practice another sequence may be followed. There is a difference whether a new institution born simultaneously with the new, socialist system, is involved, so e.g. the local government councils, where the mere existence of the institution was to be ensured, or a traditional, well established institution. The answer depends on the actual stage of development of social conditions in the different People's Democracies and on the different positions taken by legislature.

It stands to reason that in the course of this new legislation a comparison has been, or is to be drawn, between the law born in the first phase of legislation and the own, earlier law of the time before the Liberation. This comparison was, of course, a more difficult task than to make a comparison between our law and that of the other socialist countries. Here in any case we have a new element, an element which played no part, or not proper part, in the first phase of legislation. As a result of this analysis it seems in many cases as if we returned to methods of our law before the Liberation. In this attitude the survival of earlier legal thinking may also have a share. Making use of some of the solutions of the earlier law is not a wrong method in itself provided, of course, that the method in question is legally correct, socially justifiable and immanently logical. Here we may quote an example from recent days, naturally in a generalized form, viz. the reform of criminal law carried out recently. The return to the earlier division of the criminal offences into crimes and misdemeanours (a category in the earlier Hungarian law including criminal acts of lesser gravity) was justified by a social need for the introducing of a category of offences of a lower gravity than that of crimes. However, this solution may be criticized. The question has remained open, whether a clear-cut line may be drawn between these two categories of offences at all, whether the cause of this distinction is not the supposed gravity of the act, i.e. a mere social value judgement, and whether a delimitation offering itself for a better legal formulation could not be created. This latter question was debated in an animated way already in course of the codification of the Criminal Code, and even after the enactment of the Code, so as early as in 1899 by Professor Rustem Vámbéry (Jogtudományi Közlöny, No 36). A new theoretical justification of this division has not been born ever since this criticism was sounded, so that even

by now the impression has not been dispelled altogether as if it were simply the adoption of the example of the past which exerted here its influence.

The following of past examples is, of course, by itself no crime and not even mistake, incidentally this is not even simply the case of the example of the legal system of the past, as a more or less homogeneous social formation. As for the different details of the institution of the judiciary it is not its social and legal character and structure of the organization as a whole that may be argued, but it is one or the other institution, moreover often only an element of such institution will come into prominence, that may be made use of in principle, even in a socialist system. Therefore in our opinion the relative increase of the number of elements reminiscent of the past is not in itself an evil, even if this increase has a retrospective appearance. By appropriate explanatory and informative work this phenomenon can be made understandable. The problem is rather this: in the same time the examples of other legal systems offer further possible solutions which are of a new type merely because they depart from the earlier solutions, but also because they incorporate and use legal experiences of recent date. In this connection presumably the opening of wider vistas will offer a wider choice of patterns of solution. The solutions of the earlier Hungarian legal system at their time in all probability agreed with contemporary foreign solutions, still these solutions have in the meantime become obsolete, so that we may draw on examples which in foreign laws have already become obsolete. Here and in this form the question of the law of the past and also the question of the applicability of certain institutions of the earlier law and their ideological effects and relations arises.

IV

It can hardly be called into doubt that the legal systems of the socialist countries exercise an influence on one another. What may be asked is at most, how far this influence extends. By way of introduction we point out that attempts at the unification of the laws of the socialist countries are of very early date. In 1949—1950 the Czechoslovak and Polish Codes of Family Law were drafted in close co-operation. In both Codes several wholly uniform provisions were taken up, and on the whole there were slight differences only in the two rules. This first attempt, premature and naive to a certain extent, must be considered as unsuccessful. Meanwhile both Codes have been amended, and the development of family law, to some extent, follows different paths in the two countries. It would be exaggerated to state that this example of a negative value has hindered the trends towards unification in socialist law.

The field where a definite form of unification has begun to unfold itself is closely associated with the integration within the CMEA. This is explained in the first place by the demand for the uniform regulation of mutual rela-

tions, or what amounts to the same, by a tendency towards the uniform regulation of an efficient co-operation. In the course of this process, first, in all likelihood, in every socialist country, more or less identical municipal regulations — i.e. regulations not incorporated in any international treaty — will or may come into being, the unity of which will manifest itself in their identical contents; in addition, international treaties have been ratified by the socialist countries, which, however, cannot be properly called unification. What concerns us in the first place is not the latter, that is, the international legal aspect, though its fundamental importance cannot be ignored, but it is the legal system called normal and the present state of the problem of unification in the socialist countries.

We have already made it clear that strictly speaking unification has no or only very few symptoms in the socialist legal system. There are more and also visible symptoms of what may be called the harmonization of legal systems, i.e. a greater or lesser harmony among the legislative solutions, concerning partly the identical trend of development, partly the identical character of some of the solutions chosen. All that has been said here obviously is worth to discuss: it cannot be denied that in the uniform character of the main tendency of development the uniform trend of social development manifests itself in the same way in the uniform character of the problems to be tackled, or in jurisprudence, where interrelations, the mutual exchange of achievements and the joint search for solutions, or their search in the same direction, are perceptibly more obvious than in the work of the legislation itself.

Yet is there not some sort of regularity in the lack of unification and the tardiness in harmonization, something which is anyway characteristic of the socialist development of law in the present days? Certainly, there is. We cannot tell whether this is a characteristic trait of the movement of all socialist legal systems, or only of definite periods of some of the legal systems. It is probable, however, that the socialist social development as a whole may in the present period among others, be characterised by this, as well. We may even say that immediately following upon the transition to the popular democratic system before all those socialist institutions had to be built up, even if only in their rough outlines, which constituted the essence and foundations of socialism. At that time, these institutions could be discovered in their existing form only in the Soviet Union, and it was for this reason that in the early phase of popular democratic development it appeared as if the new institutions were outright and complete adoptions of the Soviet example. What is characteristic today of Hungarian popular democratic development, and obviously also of the development in other popular democracies is, in addition to the preservation of the fundamental socialist traits either by introducing new institutions or by maintenaing the earlier ones, that an ever wider scope is opened to the unfolding of — though socially secondary, still for the purpose of everyday life vitally im-

portant — national properties complying with national characteristics and in this connection even to the "free play", i.e. to experimentations with particular methods, or to the repeated testing of new and old institutions. The present phase of development seems to be unfavourable for unification, also because it is the variety of socialist legal systems which nowadays comes to the fore. We should not, however, forget, that this manifoldness anyhow relies on and is intertwined with the identity of these principles.

This situation described in broad outlines does not, however, thrust the task of certain branches of socialist jurisprudence to the background, namely the task to study the various legal solutions, and by widening the scope of knowledge to expand the choice between methods of solution, laying thereby the foundations of a possible future unification contributing thus to the harmonization of the socialist legal systems.

Comparative law has proved to be an extremely useful means of the performance of these functions of socialist jurisprudence, notable comparative law sets out from a theoretical and ideological point of view reaching thus the threshold of practical conclusions. The comparison of the socialist legal systems among themselves, called "internal" comparative law, i.e. comparative law within socialism, — the case being one of the comparison of legal systems belonging to the same type of law — will lay the foundation of comparative law going down to theoretical depths, and at the same time opens the path for the practical use of the results of comparative law, what is of necessity the theoretical antecedent of all kinds of legal harmonization. In many cases the dividing line between theoretical comparative law and the practical harmonization of the legal systems becomes indistinctive. This circumstance will in any case contribute to the expansion and propagation of comparative law in the socialist countries. Partly, in the activities of scholars comparative law, and in the first place the comparative study of the socialist legal systems, i.e. internal comparative law with respect to socialist law, should have a larger share. Moreover legal thinking will have to be expanded in the direction of comparative law, even legal practitioners should have acquire more thorough knowledge of the law of other countries, in the first place of the law of the socialist countries, and enrich their legal knowledge by widening their horizon.

The political and national character of the particular legal systems will of course survive as long as there will be states. However, in the assertion of these legal systems a function will be assigned to the legal experience, legislative solutions, and last but not least, to the judicial practice of the legal systems of the countries progressing in the same direction. Thus, even if only to a limited extent, in the course of the application of law a role will be played by the series of experiences which those in charge of the application of law have tried out with respect to the legal systems and the judicial practice of other socialist countries. Even if there can be no talk of comparative law as a characteristic feature

of the application of law, those in charge of the application of law are at the same time jurisprudents, who have to extend the scope of their thinking to an element of comparative law, at least to the comparison of the laws belonging to the same type. It may be assumed, and this is the point where we conclude our reasoning, that here we shall find the link in our legal development, legal thinking and, in all likelihood, in the teaching of law, which we have to grasp in our days.

Les tendances et les problèmes de développement en droit hongrois

par

I. Szabó

I. Le développement du droit de la démocratie populaire hongroise est arrivé à la deuxième étape de la codification et de la législation. L'auteur analyse les données numériques des règles de droit jusqu'ici créées, les proportions entre les lois et les règlements ainsi que les rapports mutuels existant entre ceux-ci, comme aussi le problème des actes normatifs dits «illégaux».

II. Dans la deuxième partie sont traités les périodes de législation débutant en 1967 et en 1970, le caractère des nouvelles règles de droit ainsi que la fusion des éléments antérieurs et nouveaux dans celles-ci. Dans la suite l'auteur analyse la relation entre la stabilité et la mobilité dans la période de la législation nouvelle et les causes sociales ainsi que celles de la technique juridique résultant des changements survenus.

III. Dans la troisième partie sont formulés les principes régissant les tâches actuelles. Celles-ci consistent selon l'auteur dans la synthèse des enseignements aux fins de la codification, dans la révision du droit jusqu'ici créé et enfin dans la mise en parallèle de celui-ci avec le droit d'avant la libération. Cette partie finit avec une analyse profonde de ce dernier problème.

IV. Dans sa quatrième partie l'étude développe la question de l'unification des droits des pays socialistes et esquisse les tentatives jusqu'ici accomplies. Dans la suite l'auteur s'occupe de la législation unie nationale et internationale exigée par l'intégration économique. Il analyse la situation de l'harmonisation des systèmes de droit dans le droit socialiste et attire l'attention au retard de ce processus. L'auteur souligne la tâche des sciences juridiques concernant l'établissement des bases de l'unification et la facilitation de l'harmonisation. L'étude fait une comparaison des systèmes de droit socialistes en soulignant la portée de la science juridique en cette matière. Pour finir, l'auteur met en relief le rôle du droit comparé dans le domaine de la création et de l'application du droit.

Die Tendenz und die Probleme der ungarischen Rechtsentwicklung

von

I. Szabó

I. Die ungarische volksdemokratische Rechtsentwicklung gelangte in das zweite Stadium der Kodifikation und der Rechtsschaffung. Der Autor analysiert die zahlenmäßigen Daten des zustandegekommenen Rechtsmaterials, die Proportion der Gesetze und der Verordnungen und ihr Verhältnis zueinander, sowie die Frage der »illegalen« Akte.

II. Im zweiten Teil werden die mit 1967 und 1970 beginnenden Perioden der Rechtsschaffung, der Charakter der neuen Rechtsnormen sowie die Vermengung der

früheren und der neuen Elemente in ihnen besprochen. Darauf folgend analysiert der Verfasser das Verhältnis der Stabilität und der Mobilität in der neuen Rechtsschaffungsperiode und die gesellschaftlichen und rechtstechnischen Gründe der Veränderungen.

III. Der dritte Teil enthält die prinzipielle Formulierung der heutigen Aufgaben. Diese werden vom Verfasser in folgenden zusammengefaßt: Sammlung von Erfahrungen zur Kodifikation; die Kontrolle des bisher geschaffenen Rechts; der Vergleich mit dem Recht vor der Befreiung. Die letztere Frage wird in der Abhandlung eingehender analysiert.

IV. Im vierten Teil wird die Frage der Vereinheitlichung des Rechts der sozialistischen Länder erörtert und die bisherigen Versuche geschildert. Der Verfasser befaßt sich des weiteren mit der durch die wirtschaftliche Integration erforderten einheitlichen nationalen und internationalen Rechtsschaffung. Er beschreibt die Lage der Harmonisierung der Rechtssysteme im sozialistischen Recht und weist auf die Verzögerung dieses Prozesses hin. Im weiteren hebt er die Aufgabe der Rechtwissenschaften in der Begründung der Vereinheitlichung und in der Förderung der Harmonisierung hervor. Es werden die sozialistischen Rechtssysteme unter diesem Aspekt verglichen und die Bedeutung der Rechtswissenschaft in dieser Beziehung betont. Schließlich entfaltet der Verfasser die Rolle, die die Rechtsvergleichung in der Rechtsschaffung und in der Rechtsanwendung zu spielen hat.

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Региональное правовое сотрудничество и организация правотворчества в сфере международного права

Э. УШТОР

посол, Министерство иностранных дел ВНР

В статье излагается структура Межамериканского юридического комитета (Юридической комиссии ОАГ), Азиатско—Африканского юридического консультативного комитета, Европейского комитета юридического сотрудничества и их взаимоотношений с комиссией международного права ООН. Устанавливается, что социалистические государства только в рамках СЭВ располагают органом по юридическому сотрудничеству, а именно в лице Совещания представителей стран-членов СЭВ по правовым вопросам, однако этот орган не занимается вопросами прогрессивного развития международного права и его кодификации. Статья разделяет мнение, что темпы международной жизни и развития международного права требуют ускорения хода кодификации. Организационная структура Комиссии Международного права ООН, сравнительная кратковременность ее ежегодного фукционирования не позволяет увеличить объем ее работы и продуктивность. В статье высказывается мнение о желательности того, чтобы региональные международные организации занимались вопросами кодификации и прогрессивного развития международного права систематичнее, регулярнее и более согласованно, чем до сих пор. По утверждению статьи этим путем можно было бы мобилизовать свежие силы для организации правотворчества по международному праву. Обязательной предпосылкой осуществления этих идей согласно статье является, чтобы и социалистические государства тоже создали свою международную организацию, занимающуюся развитием международного права.

Деятельность по прогрессивному развитию международного права и его кодификации — что в девятнадцатом веке было всего лишь стремлением ученых-энтузиастов и ученых обществ[1] — в двадцатом веке разрослась в официальную цель, которую ставят перед собой и осуществляют сообщества государств.

Первые официальные, регулярные шаги в области «прогрессивной кодификации» (progressive codification) международного права предприняла Лига наций. В преамбуле статьи Версальского договора об учреждении Лиги наций (Covenant of the League of Nations) акцентируется решимость договаривающихся сторон, что «нормы международного права впредь категорично признаются фактически действующим правилом, истинным критерием взаимного поведения правительств» (". . .the firm establishment of the understandings of international law as the actual rule of conduct among Go-

[1] Детальный исторический обзор по этому вопросу дается в документе ООН от 16 мая 1947 года: Нота о неофициальных попытках по кодификации международного публичного права. A/AC. 10/5.

vernments") и что «во взаимных сношениях между организованными народами обеспечивают господство истины и добросовестного уважения всяческих договорных обязательств» ("...the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another").

Первые шаги Лиги наций в этой области не увенчались особым успехом.[2] Однако эта малоуспешность не удержала основателей Организации Объединенных Наций, чтобы в Уставе поставить целью «поощрение прогрессивного развития международного права и его кодификации», как это явствует зи пункта а) абзаца 1 статьи 13.

Известно, что результаты, достигнутые ООН, далеко превосходят все то, что когда-либо совершалось в этой области, и что достижению этих результатов значительно содействовала Комиссия международного права, учрежденная Генеральной Ассамблеей ООН.[3]

Хотя не вызывает сомнения, что в настоящее время ООН и в особенности Комиссия международного права являются важнейшими официальными учреждениями, служащими делу развития международного права, видно, что государства не ограничивают свое сотрудничество в этой области рамками Организации Объединенных Наций.

В данной статье я стремлюсь показать те региональные форумы, — их структуру и функционирование, — в рамках которых осуществляется сотрудничество между государствами — в частности — в целях развития международного права, пытаюсь дать вкратце оценку этих форм сотрудничества, изложить стоящие перед ними перспективы и возможную роль в международно-правовом правотворчестве. Под международно-правовым правотворчеством (international law-making) в данной статье, ради простоты, мной понимается та деятельность, которая выполняется главным образом Комиссией международного права ООН: составление проектов по созданию таких международных договоров, целью которых ставится официальная кодификация или прогрессивное развитие международного права. В статье касаюсь и той растущей потребности, которая предъявляется в этой области со стороны государств, в особенности к Комиссии международного права, и занимаюсь вопросом, имеются ли возможности для увеличения роли региональных юридических организаций в организации международно-правового правотворчества.

1. Наиболее давние традиции регионального сотрудничества в сфере международного права известны на американском континенте. Латиноамериканские юристы охотно цитируют слова национального освободителя Симона Бо-

[2] См. об этом: Ustor, E.; *A nemzetközi jog fokozatos fejlesztése és az ENSZ.* (Прогрессивное развитие международного права и ООН). Jogtudományi Közlöny, 1965. 487. p.

[3] См. Статью, упомянутую в примечании 2.

ливара из написанной им в 1826 году статьи «Мысли о конгрессе в Панаме» ("Thoughts on the Congress of Panama") о том, что «политические общества получат кодекс публичного права, регулирующий их универсальное, единообразное поведение», в итоге чего «Новый Свет образуется из независимых наций, которые будут взаимосвязаны друг с другом единым обычным правом, определяющим их внешние сношения . . .»[4] ("The relations of the political societies would receive a code of public law as a rule of universal conduct" and thus "the New World would be made up of independent nations, all bound togehter by a common law which would determine their foreign relations . . .").

Латиноамериканские конгрессы девятнадцотого века и в особенности Юридический конгресс в Лиме (Juridical Congress of Lima, 1877-79), а также Южноамериканский конгресс по международному частному праву в Монтевидео (South American Congress of Private International Law 1888-89) стремились к тому, чтобы путем международных договоров разработать единообразные правила, в особенности в аспектах международного частного права.

Третья Межамериканская конференция (Рио-де-Жанейро, 1906) приняла конвенцию «О международном праве». Этот документ учредил Международную комиссию юристов (International Commission of Jurists), в состав которой входило по одному представителю от каждого договоривающегося государства. Начиная с этого времени в межамериканской системе создавалось, упразднялось и вновь организовывалось множество комиссий юристов.[5] Что касается достигнутых этими комиссиями результатов, представители американского континента (и прежде всего Латинской Америки) могут ссылаться на примерно сотню соглашений и договоров, принятых на Американских конференциях, на некоторых конференциях, созванных по специальным вопросам, и в рамках Панамериканского союза, которые свидетельствуют о выдающейся развитости и многосторонности межамериканского писанного права. Среди этих договоров находятся и такие прокладывающие новый путь, как принятый в 1928 году договор «О дипломатических чиновниках» (on diplomatic officers), Кодекс о банкротствах (Bustamante-Code), соглашения о праве предоставлении территориального и дипломатического убежища, о правах и обязанностях государств и т. д. Исходя из этого, высказанное одним видным американским автором критическое замечание, утверждающее, что различные кодификационные органы, функционировавшие до «Хартии Богота», принятой в 1948 году, большей частью работали безрезультатно[6], мы должны признать слишком строгим.

[4] *The Inter-American system.* New York, Inter-American Institute of International Legal Studies, 1966. 25. p.

[5] См. труд, упомянутый в примечании 4, а также: Masters Ruth D. *Handbook of international organizations in the Americas.* 1945.

[6] Kunz, J. L.: *The Bogota Charter of the OAS.* В сборнике "*The Changing law of nations*". 1968. 767. p.

В настоящее время официальным органом международного юридического сотрудничества в западном полушарии является Межамериканский юридический комитет (Inter-American Juridical Commitee). В 1969 году вступил в силу подписанный в Буэнос-Айресе 27 февраля 1967 года Протокол об изменении Хартии Организации американских государств,[7] упразднивший Межамериканский совет юристов[8] (Inter-American Council of Jurists). Согласно статье 105 упомянутого протокола задача Межамериканского юридического комитета состоит в том, чтобы служить Организации в качестве консультативного органа по юридическим вопросам, способствовать прогрессивному развитию международного права и его кодификации, изучать правовые вопросы в связи с интеграцией развивающихся стран полушария и — если это представится желательным — также и возможность достижения единообразия их законодательства: "...to serve the Organization as an advisory body on juridical matters, to promote the progressive development and the codification of international law; and to study juridical problems related to the integration of the developing countries of the hemisphere and inso far as may appear desirable, the possibility of attaining uniformity in their legislation."

Комитет состоит из одиннадцати юристов, которые могут быть гражданами только государств-участников. Генеральная Ассамблея Организации избирает членов Комитета сроком на четыре года из числа кандидатов, выставленных государствами-участниками. При избрании по возможности следует принимать во внимание справедливое распределение по географическому признаку (Протокол, Статья 107). "The Committee is composed of eleven jurists, nationals of the Member States, elected by the General Assembly of the Organization for a period of four years from among the candidates presented by the Member States on the basis — as far as possible — of equitable geographic destribution." Комитет может организовыать и проводить исследования по желанию Генеральной Ассамблеи Организации, отдельных ее Советов, а равно по желанию Консультативного совещания Министров иностранных дел, либо же по собственной инициативе (Протокол, Статья 106): "Studies are undertaken by the Committee upon request of the higher organs of the Organization: the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, the Councile or upon the Committee's own initiative."

Местопребывание Комитета — Рио-де-Жанейро. Комитет имеет право устанавливать отношения сотрудничества с другими национальными и между-

[7] *International Legal Materials*, 2/1967. 310 p.

[8] По истории этого вопроса см. отчет Секретаря Комиссии международного права о третьей сессии Межамериканского совета юристов, *Yearbook of the International Law Commission (Ежегодник Комиссии международного права)*; в дальнейшем: Ежегодник КМП. 1956. т. II, p. 236

народными учреждениями, посвященными правовым вопросам международного значения. (Статья 109): "The Committee, which has its seat in Rio de Janeiro can establish co-operative relations with other national and international institutions devoted to law and jrudical matters of international interest."

Межамериканский юридический комитет является представителем всех государств-участников Организации американских государств. (Статья 108): "The Inter-American Juridical Committee represents all of the Member States of the Organization."

«Все государства-участники» в момент написания данной статьи означает меньше, чем традиционный состав членов ОАГ. Отсутствие социалистической Кубы является большим недостатком Организации и значительно умаляет также и репрезентативный характер Юридического комитета. В 1972 году Организация американских государств определила Устав Юридического комитета, в статье 38 которого детально излагаются назначение и цели, состав, функции и полномочия, процедурные вопросы отправления дел Комитета, распоряжается относительно привилегий и иммунитета членов, о порядке принятия решений, о кворуме и голосовании, о несении расходов Комитета, о работе секретариата Комитета и т. д.[9]

Вкратце приведем несколько примеров относительно предметов, которыми в последнее время занимался Комитет: Международные компании, находящиеся в государственной собственности (government-owned international companies). Нарушения международных обязательств «бездействия» (статус-кво) (violations of international "standstill" (status quo) commitments), как, например, нарушения статьи XXXVII ГАТТ. Эта статья запрещает увеличение ограничений (нетарифных импортных барьеров) на ввоз товаров, особо важных с точки зрения вывоза развивающихся стран[10]. — Затрагивающие международные связи, похищения людей или иные акты терроризма против личности. — Пересмотр межамериканских договоров об интеллектуальной собственности[11]. — Вопросы морского права, модернизация латиноамериканской конвенции о выдаче от 1933 г. и т. д.[12]

Организация американских государств была первой региональной организацией, которая установила контакты с Комиссией международного права ООН. Согласно Положению о Комиссии международного права, принятому резолюцией Генеральной Ассамблеи ООН за № 147 (II): «Целесообразность консультации между Комиссией и межправительственными органами, задачей которых является кодификация международного права, как, например, органы Панамериканского союза, считается установленной»

[9] *International Legal Materials*, 1972. p. 746.
[10] *Ежегодник КМП*, 1970, т. I. pp. 119—120.
[11] *Ежегодник КМП*, 1971, т. I. p. 255.
[12] *Протокол 1227-го заседания КМП* 14 июня 1973 г.

(Статья 26, пункт 4). ("The advisability of consultation by the Commission with intergovernmental organizations whose task is the codification of international law, such as those of the Pan-American Union, is recognized").

На основании этого положения, а также на основании собственных Положений, Межамериканский Совет юристов на заседании в 1950 году принял решение о создании отношений сотрудничества с Комиссией международного права ООН.[13] Эта Комиссия в 1954 году тоже приняла решение в аналогичном смысле.[14] Представитель Организации американских государств принял в качестве наблюдателя впервые участие в заседаниях Комиссии международного права ООН в 1956 году.[15]

II. Азиатско–Африканский юридический консультативный комитет (Asian-African Legal Consultative Commitee) направил своего наблюдателя[16] на заседание Комиссии международного права ООН впервые в 1961 году — по приглашению Комиссии. Перед этим представитель Комиссии международного права ООН в качестве наблюдателя присутствовал на четвертой сессии Консультативного комитета.[17]

Комитет первоначально был основан под наименованием «Азиатский юридический консультативный комитет» в 1956 году семью государствами (страны-учредители: Бирма, Индия, Индонезия, Ирак, Сирия, Цейлон и Япония), с той целью, чтобы в качестве консультативного органа юридических экспертов заниматься направленными к нему вопросами и оказывать государствам-участникам помощь по совместно интересующим их юридическим проблемам путем обмена воззрениями и высказывания мнения. В 1958 году, по предложению тогдашнего премьер-министра Индии Джавахарлала Неру, государства-участники изменили Устав Комитета таким образом, что в него могли вступать также и государства африканского континента. Тогда и принял Комитет нынешнее свое наименование.

Число государств-членов с тех пор увеличилось до 20, среди них 15 азиатских (Бирма, Индия, Индонезия, Ирак, Иордания, Кувейт, Малайзия, Непал, Пакистан, Сирия, Таиланд, Филиппинские Острова, Шри Ланка, Япония), 5 африканских государств (Арабская Республика Египет, Гана, Кения, Нигерия, Сьерра-Леоне).[18] Комитет рассчитывает на дальнейшее умножение числа членов, поскольку наряду с английским языком декларировал в качестве рабочего языка также и французский.[19]

[13] *Ежегодник КМП*, 1960, т. II. p. 121.
[14] *Ежегодник КМП*, 1954, т. II, 162.
[15] Canyes, на 357-ом заседании КМП.
[16] Hafez Sabeh, на 605-ом заседании КМП.
[17] Garcia Amador, его доклад см. в Ежегоднике КМП, 1961, т. II, p. 78.
[18] В составе Комитета имеется и два неполноправных, ассоциарирующих члена: Мавритания и Южная Корея (A/CN 4/272).
[19] Fernando, наблюдатель Консультитавного комитета на 1136-ом заседании КМП 14 июля 1971 года.

Задачи Комитета определяются статьей 3 Устава, В частности, в число задач входит:

«Изучение вопросов, обсуждаемых Комиссией международного права, и принятие мер, чтобы воззрения Консультативного Комитета представлялись в КМП; вхождение с рекомендациями по их предмету в правительства государств-участников Консультативного комитета . . .

Консультативный комитет — с согласия правительств участвующих государств — сообщает мнение о поступивших к нему вопросах международного права в Организацию Объединенных Наций, другие учреждения и международные организации». ("To examine questions that are under consideration by the International Law Commission and to arrange for the views of the Committee to be placed before the said Commission; too examine the reports of the Commission and to make recommandations thereon to the Govern ments of the participating countries; . . .

To communicate with the consent of the Governments the participating countries the points of view of the Committee on international legal problems reffered to it, to the United Nations, other institutions and international organizations.")

Консультативный комитет проводит свои заседания каждый год на территории другого государства-участника. Одиннадцатая сессия состоялась в 1970 году в Аккре (Гана), двенадцатая в 1971 году в Коломбо (Шри Ланка), тринадцатая в 1972 году в Лагосе (Нигерия), четырнадцатая в 1973 году в Нью-Дели, а следующую очередную сессию намечается провести в 1974 году в Токио.[20]

Работа Комитета сопровождается постоянно растущим вниманием; на сессию Комитета в Коломбо (1971) прибыли наблюдатели из Советского Союза, Латинской Америки, Соединенных Штатов и прислали своих наблюдателей Комиссия международного права, Европейский совет, а также Всемирная организация охраны интеллектуальной собственности (BIRPI/WIPO). На сессии в Нью-Дели в 1973 году присутствовали наблюдатели или делегации наблюдателей, представлявших уже не менее 40 государств и международных организаций, в том числе Лигу арабских стран, Комиссию ООН по международному торговому праву (UNCITRAL) и учрежденный в Риме Международный институт унификации частного права (UNIDROIT).

Консультативный комитет имеет Генерального секретаря и заместителя генерального секретаря и предполагается назначение также и одного управляющего для руководства научными исследованиями.[21]

Комитет до сего времени занимался разнообразными предметами: в частности, договорным правом, положением беженцев, вопросами междуна-

[20] Sen, на 1235-ом заседании КМП и A/C 4/272.
[21] Fernando, см. примечание 19.

родной купли-продажи товаров, вопросом о Намибии (Юго-Западная Африка), двойным налогообложением, международным навигационным правом и т. д. Сессия 1973 года в Нью-Дели посвятила свое время главным образом морскому праву, и занималась кроме того следующими предметами: охрана и неприкосновенность дипломатических представителей и прочих лиц, управомоченных на особую защиту по международному праву, организация консультационных служб в Министерствах иностранных дел, правовой статут международных рек, международная купля-продажа.[22]

III. Европейский комитет юридического сотрудничества (The European Committee on Legal Co-operation) был создан в 1963 году Европейским советом, организацией западноевропейских и нескольких прочих государств, с той целью, чтобы продвинуть сотрудничество государств-участников в области права. По Уставу[24] Комитет образуется из делегаций государств-участников Европейского совета и в работе его совещаний принимают участие также и три представителя, выделенные Консультативной Ассамблеей Совета, но без права голосования. Делегации государств-участников состоят по общему правилу из высокопоставленных представителей Министерств иностранных дел и юстиции. С согласия всех членов на заседаниях могут присутствовать также и наблюдатели от государств, не являющихся членами Совета: на одно из заседаний в недавнее время направили своих наблюдателей Испания и Финляндия. Комитет избирает председателя, двух заместителей председателя и одного раппортера.

Уставом возлагаются на Комитет широкие и разнообразные задачи. В аспекте предмета нашего рассмотрения существенен пункт 3(e) Устава, согласно которому Комитет должен держать в поле зрения «работу, выполненную в рамках других организаций или учреждений, с тем, чтобы эффективно координировать и продвигать сотрудничество по делам, представляющим общий интерес». (" . . . to follow the evolution of the works carried out in the framework of other organizations with a view to achieve an effective co-ordination of the works and to promote co-operation in matters of common interest".) Явно на основании этого предписания установил Комитет связь с Комиссией международного права ООН.[25] Обе организации регулярно взаимно посылают на заседания своих наблюдателей.

[22] A/C N 4/272

[23] Имеется некоторое противоречие в том, что Совет, образовавшийся в 1949 году, именуя себя Европейским советом, согласно преамбуле и первой статье своего Устава намеревается категорически исключить из круга своих членов часть европейских государств, а именно социалистические государства. Среди европейских социалистических государств отмечается недовольство в связи с этим, и в статьях Устава, которые косвенно осуждают социалистический общественный строй, они чувствуют поветрие холодной войны.

[24] Решение Комитета Министров Совета от 13 декабря 1963 года за № (63) 29. См L. *Manual of the Council of Europe*. London, 1970.

[25] *Ежегодник КМП*, 1966, т. I. ч. I, p. 31.

Главная задача Комитета заключается в «исполнении юридической программы Европейского совета». В детали этого пердмета на этот раз мы не вдаемся. Из предметов принятой в 1963 году «Новой юридической программы»[26] из числа пунктов, входящих в сферу всеобщего международного права, назовем следующие: иммунитет государства, консульские задачи, оговорки к международным договорам, публикации, излагающие практику государств в сфере международного права, загрязнение международных водных путей, мирное урегулирование международных споров, сохранение и использование дна морей и океанов и его недра для мирных целей, обеспечение охраны дипломатов и т. д. (Immunity of States; consular functions; reservation to international treaties; publication of a digest of State practice in the field of international law; pollution of international waterways; judicial settlement of international disputes; peaceful uses of the sea bed and the ocean floor; protection of diplomats etc.)

IV. Европейские социалистические государства — восточноевропейская группа, как их иной раз называют в кругах ООН — до сего времени еще не создали постоянного органа, который обобщил бы воедино всю сферу их юридического сотрудничества, хотя необходимость такого сотрудничества социалистические юристы-международники чувствуют. В 1969 году был образован форум для юридического сотрудничества в весьма важной, однако все же ограниченной сфере, а именно в рамках Совета Экономической Взаимопомощи. Этот форум — «Совещание представителей стран-членов СЭВ по правовым вопросам», сокращенно «Юридическое Совещание СЭВ». Согласно Положению, которое было утверждено Исполнительным Комитетом в октябре 1970 года,[27] «Совещание имеет целью содействовать совершенствованию правовых основ экономического и научно-технического сотрудничества между странами-членами СЭВ путем изучения, разработки и последовательного решения правовых проблем этого сотрудничества». Совещание не поддерживает сношений с учреждениями, не входящими в организацию СЭВ. Несомненно, однако, что Совещение должно заниматься и такими темами, в связи с которыми должно будет принимать во внимание также и работу, выполняемую другими юридическими организациями. По вопросу ответственности государств, например, — отдельные аспекты которого Совещанию приходится изучать — оно должно будет принять во внимание итоги работы, ведущейся в этой области в Комиссии международного права ООН.

Занимаясь дальнейшим совершенствованием всемирно известных Об-

[26] WIEBRINGHAUS, H.: *Le Comité Européen de Coopération Juridique.* Annuaire Français de Droit International, 1964. 555. p.

[27] Полный текст Положения приводится в сборнике документов «*Многостороннее экономическое сотрудничество социалистических государств*». Под общей редакцией кандидата юридических наук Токаревой П. А., Москва, Юридическая литература. 1972, pp. 167—169.

щих условий поставки,[28] Совещание не может оставить вне внимания то, что сделано в рамках Комиссии ООН по международному торговому праву (UNCITRAL[29]). И хотя основополагающие экономические обстоятельства и условия совершенно различны, не помешает, если в ходе исследования проблем, связанных с созданием совместных предприятий социалистических государств, Совещание ознакомится также и с материалом исследований относительно международных компаний, находящихся в государственной собсобственности, которые выполнены Межамериканским юридическим комитетом.

Не входит в число функций Совещания изучение таких вопросов международного права, которые выпадают из круга экономического и научно-технического сотрудничества государств-участников СЭВ.

Автор данной статьи убежден, что сообщество социалистических государств тоже нуждается в официальном юридическом форуме для организованного обсуждения, консультации по вопросам, выходящим за сферу экономического сотрудничества, для обсуждения, уяснения и развития социалистических воззрений по вопросам всеобщего международного права. Весьма категорично и веско отстаивал эту точку зрения также и старший юрисконсульт Министерства иностранных дел СССР Олег Николаевич Шестов на Первом Совещании Министров юстиции социалистических стран, состоявшемся в октябре 1972 года в Будапеште.

V. Изложенные моменты позволяют заключить, что организация регионального сотрудничества по правовым вопросам повсеместно в мире ширится и развивается. Отмечается всеобщая склонность к такому сотрудничеству, что отвечает наличествующей в этой области потребности.

Участие государств в подобном сотрудничестве усиливается, однако ныне еще далеко не достигло максимума.

Региональные юридические организации не ограничивают свою деятельность изучением тех проблем, которые интересуют в первую очередь представленную ими часть света, но более-менее регулярно, систематически занимаются и вопросами, относящимися в сферу всеобщего международного права.

В их структуре отсутствует единообразие. Состав региональных юридических организаций, наметка задач, методы работы формируются традицией — как в межамериканской организации — и целеустремлениями участвующих государств.

[28] Обширную литературу о них исчерпывающе разрабатывает: Katona, P.: *The international sale of goods among the member states of the Council for Mutual Economic Assistance.* Columbia Journal of Transnational Law, 2/1970. p. 226.

[29] См. Ustor E.: *Développement progressif du droit commercial: un nouveau programme de l'ONU.* Annuaire Français de Droit International, 1967. p. 289.

Вопреки таким различиям все члены Комиссии международного права ООН ценят их деятельность и приветствуют их сотрудничество с Комиссией.

«Усилия региональных организаций могут облегчить работу Комиссии международного права» — как это было высказано в Комиссии,[30] Далее было отмечено, что «желательно, чтобы единообразные для всего мира решения по какому-либо предмету опирались на региональный опыт».[31]

Достоверные сведения о работе, текущей в региональных организациях, «имеют особо важное значение для того, чтобы Комиссия международного права могла надлежащим образом ответить возлагаемым на нее задачам».[32]

Высказывалось также, что «Комиссия должна поощрять региональные организации и оказывать им всяческую помощь, в которс й они нуждаются».[33]

Члены Комиссии международного права в равной степени ценят деятельность трех региональных организаций и их содействие работе Комиссии.

Относительно Афро-Азиатского консультативного юридического комитета члены Комиссии международного права ООН подчеркнули, что «хотя новые африканские и азиатские государства по всей вероятности нуждаются также и в подходящих для собственных потребностей правовых нормах, но они могут вместе с тем дать новые идеи сообществу наций, которые могут обогатить международное право».[34]

По мнению одного из членов Комиссии, «та тесная связь, которая установилась между Межамериканским юридическим комитетом и Комиссией международного права, содействовала прогрессу международного публичного права».[35] Он же по другому поводу заявил, что «вся Комиссия высоко расценивала работу Европейского комитета юридического сотрудничества».[36]

Такие и подобные выступления не являются данью вежливости. Региональные организации, которые по своей природе часть времени и энергии уделяют региональным делам, могут внести свой вклад и должны содействовать развитию всеобщего международного права.

VI. Почему было бы желательно, чтобы региональные юридические организации принимали более интенсивное, чем до сего времени, участие в работе по прогрессивному развитию и кодификации всеобщего международного права? Известно, что эта работа большей частью возлагается на Комиссию международного права ООН, 25-летний юбилей которой отмечался не столь давно. Генеральная Ассамблея ООН 12 октября 1973 года посвятила отдельное заседание, чтобы торжественно отметить серебряный юбилей. На

[30] Yasseen, Ежегодник КМП, 1970, т. I, p. 179.
[31] Kearney, Ежегодних КМП. 1970, т. I, p. 121.
[32] Rosenne, ibidem
[33] Nagendra Singh, ibidem
[34] Thiam, Ежегодник КМП, 1970, т. I, p. 180.
[35] Ушаков, Ежегодник КМП, 1970, т. I, p. 121.
[36] Ушаков, Ежегодник КМП, 1970, т. I, p. 149.

торжественном заседании председатель Генеральной Ассамблеи Бенитес, Генеральный секретарь ООН Курт Вальдхайм, председатель Международного суда Манфред Лахс и представители региональных групп государств-участников выступили с оценкой значения и итогов деятельности Комиссии, а от имени Комиссии выступил тогдашний ее председатель — Хорге Кастанеда.[37]

Деятельность Комиссии безусловно является эпохальной в области кодификации и прогрессивного развития международного права. Результаты, которые достигнуты Комиссией за 25 лет существования, весьма значительны и далеко превосходят все то, что было сделано ранее в области международно-правового правотворчества. Однако Комиссия в сущности и поныне работает в таких же условиях, как и 25 лет назад. Правда, численный состав Комиссии возрос с 15 до 25 человек, но продолжительность ее функционирования не превышает, как правило, десяти недель в год. (Только несколько раз случалось, что годовая сессия была продлена до 12 или же до 14 недель.) Это обстоятельство ставит передел продуктивности Комиссии.

Это тоже сыграло свою роль в том, что Генеральная Ассамблея и другие органы ООН в последние годы целый ряд таких задач, которые ставят своей целью развитие международного права в определенных областях, поручали специально создаваемым комиссиям. Это произошло при формулировке принципа дружественных отношений между государствами, при определении понятия агрессии и в ряде других областей. Из числа актуальных теперь работ подобного рода упоминались на сессии Генеральной Ассамблеи 1973 года усилия по достижению коллективной экономической безопасности, международному урегулированию многонациональных предприятий и предполагаемой хартии экономических прав и обязанностей государств.[38]

Комитет, проводивший подготовительную работу по учреждению Комиссии международного права ООН — Комитет по прогрессивному развитию международного права и его кодификации — в свое время обсудил вопрос, должны ли посвятить члены Комиссии международного права всю свою работу этой Комиссии, или же брать на себя функции членов Комиссии по совместительству, наряду с прочими своими призваниями. Подготовительный комитет большинством голосов своих членов принял решение в пользу первого варианта. Внесенное подготовительным комитетом предложение, чтобы члены Комиссии международного права все свое время посвящали работе в Комиссии, и в силу этого получали оклад, соразмерный значительности и важности своей задачи, было отвергнуто в 1947 году Подкомитетом №2 шестого комитета Генеральной Ассамблеи, главным образом по причине экономии расходов, также и потому, что по ее мнению принятие предложения не дало бы возможность для вовлечения наиболее выдающихся юристов в работу по международ-

[37] A/PV, 2151

[38] Alting von Geusau, в качестве представителя Нидерландов, A/C. 6/SR. 1400.

но-правовой кодификации.[39] В 1950 году представители Соединенного Королевства в шестом комитете на Пятой сессии Генеральной Ассамблеи высказали такое мнение, что нужно вновь пересмотреть вопрос, не следует ли придать функционированию Комиссии международного права постоянный характер. Шестой комитет запросил об этом мнение Комиссии международного права. Комиссия в отчете о III сессии 1951 года изъявила мнение, принятое по решению большинством голосов, что для продвижения ее работы было бы желательно, чтобы члены Комиссии международного права по сути дела оказались в таком положении, как члены Международного Суда; — следовательно, не могут вести других занятии и все свое время должны посвящать работе Комиссии.[40]

Шестой комитет, и по его предложению и VI сессия Генеральной Ассамблеи однако отвергли эту идею и приняли решение, что «покамест не предпринимает меры об изменении статута Комиссии международного права до тех пор, пока не обретет дальнейший опыт относительно функционирования Комиссии».[41]

Члены Комитета мотивировали свою отвергающую позицию по-разному:

— что увеличение числа проектов, составляемых Комиссией, сильно обременило бы Генеральную Ассамблею и Правительства, которые должны высказаться по поводу проектов;
— что возникли бы трудности в деле подбора специалистов, согласных работать в комитете постоянно;
— что такое решение вопроса сопровождалось бы весьма значительным увеличением расходов;
— и было высказано также и такое мнение (дискуссия проходила в январе 1952 года), что нынешняя политическая ситуация не годна для того, чтобы в международном праве смог произойти быстрый прогресс (... "the prevailing political situation was unpropitious to rapid progress in international law").[42]

С тех пор официальных предложений об изменении характера Комиссии международного права на рассматрение Генеральной Ассамблеи не поступало. Однако идея не устарела и вновь и вновь возникала.

Сэр Джеральд Фитцморис в крупном специальном отчете, составленном к юбилейной сессии Института международного права (Рим, 1973), в котором

[39] A/C. 6/193, 18 ноября 1947 г. Цитирует: Briggs, H. W.: *The International Law Commission.*

[40] *Ежегодник КМП*, 1951, т. II, p. 137.

[41] Резолюция Ассамблеи от 31 июня 1952 года № 600 (I), См. также: Briggs: op. cit. p. 74.

[42] Briggs op. cit. p. 73.

он занимается будущностью международного публичного права (The Future of Public International Law and of the International Legal System in the Circumstances of Today), выдвигает идею, что Комиссию международного права можно было бы преобразовать в расширенный орган, который, постоянно заседая в отдельных своих палатах, занимался бы различными темами; Комиссия благодаря этому могла бы принять ускоренную процедуру для установления текстов кодификационных соглашений: ". . . .the International Law Commission could be made into an enlarged body, permanently in session and subdivided into chambers dealing with different topics, adopting a more rapid procedure for bringing texts to the point of final embodiment in a codifying comvention"[43]. Фитцморис в такой договоренности усматривает путь истинной надежды – via spei – гораздо более, чем в том, что некоторыми именуется миражем международных законов, создаваемых неким международным законодательным органом. "Herein, we believe, lies the true via spei, far more than in the pursuit of, as it has so well been called "the mirage of international statutelaw", promulgated by some international legislature so distant in future time that we cannot yet discern its lineaments."[44])

По всей вероятности независимо от письменного отчета Фитцмориса — а скорее в итоге предшествующих ранее выступлений в шестом комитете — вновь высказал идею создания постоянного правотворческого учреждения представитель Объединенной Республики Танзания Хеира в шестом комитете во время XXVIII сессии Генеральной Ассамблеи ООН. По его мнению, международное сообщество нуждается в целях кодификации международного права в наличии какого-либо рода постянного учреждения, при условии, что этот орган работает непрерывно, проводит свою работу на высоком уровне и обеспечивается широкое представительство различных правовых систем мира: "The international Community needed some kind of permanent institution, provided that it had continuity and a high standard of work and that it ensured broad representation of the various legal systems of the world."[45]

Основная причина повторной все новой и новой постановки вопроса предположительно заключается в том обстоятельстве, которое в сжатой, форме было высказано делегатом Украинской ССР Ульяновой на сессии Генеральной Ассамблеи 1973 года: «Темпы международной жизни и развития международного права срочно требуют ускорения хода кодификации и улучшения работы Комиссии международного права и шестого комитета.»[46]

Вторая причина по-видимому состоит в том, что, к счастью, прошли времена холодной войны, и в немалой степени в итоге борьбы социалисти-

[43] Особый доклад, p. 73.

[44] Однако в дальнейшей части своего доклада FITZMAURICE излагает еще более утопистичную идею о международном правотворчестве, см. Особый доклад, 76 p.

[45] A/C. 6/SR. 1405

[46] A/C. 6/SR. 1400

ческих государств на первый план выдвинулась идея возможности, более того, необходимости кооперации между государствами с различным экономическим и общественным строем, и этот период особенно благоприятен для достижения быстрого продвижения в области прогрессивного развития международного права и его кодификации. Вспомним, что Генеральная Ассамблея на XXV сессии торжественно приняла решение о принципах мирного сосуществования (2625/XXV), и одним из основных принципов является положение о том, что государства обязаны взаимно сотрудничать согласно уставу ООН. Существует воззрение, что эта обязанность государств включает в себя также и обязательство сотрудничать и в области прогрессивного развития международного права и его кодификации.[47]

VII. Имеется ли выход из дилеммы, которая порождается вследствие противоречия между возросшими потребностями международного сообщества и ограниченностью возможностей, которыми располагает Комиссия международного права? Данная статья не намеревается дать полный ответ на этот вопрос или же презентировать цельный проект относительно организации международного правотворчества.[48]

Преобразование Комиссии международного права в постоянно функционирующую организацию в нынешних условиях не представляется актуальным делом. Это привело бы к коренному изменению характера существующей теперь Комиссии, а подобное изменение имеет не только сторонников,[49] но и противников. При всем этом, однако, вопрос увеличения расходов кажется таким препятствием, которое навряд ли преодолимо на сессиях Генеральной Ассамблеи, вопреки тому, что повышение расходов на КМП вместе с тем сопровождалось бы экономией по другим статьям, так как пришлось бы создавать меньше специальных комиссий по отдельным возникающим вопросам. Заслуживает внимания и такая мысль, что государства охотнее передают правовые вопросы, насыщенные более тяжелым политическим зарядом, на рассмотрение такой комиссии, в которой имеют своих прямых представителей, чем в ведение такой, где сидят независимые ученые.

VIII. Могут ли взять на себя региональные организации большую чем в настоящее время роль в процессе международного правотворчества?

[47] См. Ustor, E.: *The principle of co-operation among states and the development o international law. Questions of International Law.* Budapest, 1970. 237 p.

[48] Вопрос о том, как можно было бы ускорить завершающую фазу процесса кодификации — вступление доловоров в силу, на этот раз мы не затрагиваем. См. Ago, R.: *La codification du droit international et les problèmes de sa réalisation.* Recueil d'études de droit international en hommage à Paul Guggenheim, Genève, 1968, а также Ежегодник КМП, 1968, т. II, p. 224. 102 $_6$.

[49] Briggs "Criticism-such as those sometimes heard in the General Assembly's Sixth Committee- of the general productivity of the International Law Commission are misplac ed in view of the General Assembly's policy of treating the codification and development of international law as a limited and part-time function, on which too much money should not be spent. In time, the work may come tobe regarded as too important to leave on a part-time basis. (op. cit. p. 74.)

Мне думается, что на этот вопрос можно ответить утвердительно, и можно найти разнообразные способы, чтобы региональные организации часть своей активности посвящали этой цели.

1. Региональные организации могли бы держать в поле зрения деятельность Комиссии международного права в том смысле, что изучали бы составленные Комиссией и опубликованные по ее статутам (статья 16 пункт д, статья 21) планы и проекты и могли бы делать свои замечания по ним. Выше цитированная статья 3 Положений об Афро-Азиатском консультативном юридическом комитете может послужить хорошим образцом для остальных региональных юридических организаций.

2. Региональные организации при случае могли бы воспользоваться тем правом, обеспеченным в статье 17 Статута Комиссии международного права для всех межправительственных международных организаций, чтобы вносить предложения или представлять планы и проекты многосторонних конвенций в Комиссию международного права через Генерального Секретаря ООН.

3. Комиссия международного права также и на основании пункта е) статьи 16 и пунктов 1. и 4. Статьи 26 могла бы консультироваться по отдельным вопросам с этими региональными международными организациями, могла бы запрашивать их мнение, советы и помощь при разрешении отдельных вопросов, при разработке отдельных проектов.

4. Те, имеющие скорее протокольный характер связи, которые поддерживались региональными организациями с Комиссией международного права и в небольшом объеме между собой до сего времени, могли бы быть развиты в более тесные рабочие контакты, не только путем личных встреч, но также и путем письменных сношений, могли бы обсудить также и координирование своей деятельности, разделение некоторых задач между собой.

5. То обстоятельство, что членами Комиссии международного права являются лица, пользующиеся признанным авторитетом в области международного права, которые избираются Генеральной Ассамблеей на основании их персональных качеств в собственном лице, а члены региональных комитетов, по общему правилу, являются представителями государств, очевидно не может служить препятствием для более тесного сотрудничества между двумя разнородными органами. Государства представительствуют себя в Региональных юридических комитетах юридическими экспертами, а о членах Комиссии международного права общеизвестно, что они «в большой мере принимают во внимание политические последствия своей работы и располагают как мудростью государственных мужей, так и юридической зоркостью».

Достоинство изложенных выше соображений состоит в том, что их осуществление не потребовало бы особых организационных мер со стороны ООН, предложения остаются в рамках статута Комиссии международного права. Со стороны региональных организаций они тоже не требуют сколь-

либо далеко идущих мер, существенных изменений в уставе или значительных расходов. Государства, пожалуй, легче возьмут на себя возникающий здесь рост расходов, чем увеличение бюджета ООН.

Воплощение перечисленных идей нельзя, разумеется, считать всеобщей панацеей от всех бед и трудностей международного правотворчества, и в особенности не облегчает эта мера — или во всяком случае не слишком облегчает — бремя, которое несет Комиссия международного права. Однако мне кажется, что мобилизация региональных международных организаций и действующих в них свежих интеллектуальных сил могла бы продвинуть дело международного права. Предпосылкой для осуществления высказанных здесь соображений является, чтобы эти организации действительно обладали представительностью по соответствующему региону, и чтобы они все принимали должное участие в совместной работе по созиданию международного права. Непременной предпосылкой является, чтобы каждый регион осознал необходимость создания подобных организаций и в особенности является непременной предпосылкой то требование, высказанное мною выше неоднократно, чтобы социалистические государства тоже создали свою организацию, призванную для содействия развитию международного правотворчества.

Regionale rechtliche Zusammenarbeit und die Organisierung der Kodifikation des Völkerrechts

von

E. Ustor

Die Abhandlung bespricht die Organisation der Inter-Amerikanischen Rechtskommission, der Rechtsberatungskommission für Asien und Afrika, sowie die der Europäischen Kommission für rechtliche Zusammenarbeit und die Beziehungen dieser Organe zur UNO-Kommission für Völkerrecht. Der Verfasser stellt fest, daß es für sozialistische Staaten nur innerhalb der RGW eine — »Konferenz der Rechtsvertreter der RGW-Mitgliedstaaten« genannte — Kommission für die rechtliche Zusammenarbeit gibt. Diese Kommission befaßt sich jedoch weder mit den Fragen der Kodifikation, noch der Fortentwicklung des Völkerrechts. Die Abhandlung stimmt der Feststellung bei, laut der infolge des Tempos des internationalen Lebens und der Entwicklung des Völkerrechts der Gang der Kodifikation zu beschleunigen wäre. Die Organisation der Kommission für Völkerrecht, die verhältnismäßig kurze Dauer ihrer jährlichen Tätigkeit ermöglichen die Erhöhung ihrer Leistung gar nicht. Der Verfasser hält es für erwünscht, daß sich die regionalen internationalen Organisationen mit den Fragen der Kodifikation des Völkerrechts und seiner ständigen Entwicklung systematischer und koordinierter befass sollen. Nach der Meinung des Verfassers wären auf diese Weise neue Kräfte zu diesem Zwecke mobilisierbar.

Zur Verwirklichung dieser Gedanken stellt die Abhandlung als unerläßliche Bedingung, daß zur Entwicklung des Völkerrechts auch die sozialistischen Staaten ihre internationale Organisation ins Leben rufen.

Regional legal co-operation and the organization of the creation of international law

by

E. Ustor

The paper describes the organization of the Inter-American Legal Commission, the Afro-Asian Legal Consultative Commission, the European Legal Co-operation Commission and their contacts with the UN International Law Commission. It is mentioned that socialist States have a committee of legal co-operation only within the framework of the Council of Mutual Economic Assistance, the Conference of the Representatives of the CMEA-States on Legal Affairs; this Committee, however, is not concerned with the codification and progressive development of international law. The paper is in agreement with the suggestion that the pace of the development of international relations and international law demand a stepping up of codification. The organization of the International Law Commission, and the short annual period when it is sitting does not make the expansion of its attainments feasible. The author deems it desirable that regional international organizations deal more systematically and more concertedly with the codification and progressive development of international law than before. It is thought, that in this course, fresh intellectual resources could be mobilized to organize the creation of international law. The implementation of these ideas is tied in the paper to the indispensable condition that also socialist States form an international organization for the development of international law.

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Democracy and Competency

by

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The relations of democracy and competency are extensively debated on in social sciences of to-day. However, the problem involved in the debates is discussed also in its bearing on democracy and bureaucracy. Although the problems here referred to are not identical, nevertheless they are overlapping in many respects and there are several points of contact between them. In Marxist ideology there were several phases when the relations of democracy and competency (bureaucracy, administration) were in the focal point of lively disputes. In Hungary, like in the other socialist countries, a large number of mutually contradicting papers have been published on the problem during the latter years.

In the earlier phases of building up socialism the question of democracy and dictatorship stood in the centre of interest of political literature. The "administralization" of society and state thrust into prominence the problem of democracy and competency.

Marx in his criticism of Hegel's "Philosophy of Right" described in a classical form the relationship between "lay" and professional "sacred" knowledge. Marx accepted "lay" (profane) knowledge as the factor determining the organizational relations of society, unlike Hegel, who idealized "professional" or "sacred" knowledge. "Professional knowledge" is the foundation of bureaucratic organization.

In an organizational sub-system either of the two types of knowledge may become predominant. "Lay" knowledge is the characteristic feature of political organization. In the administrative systems, so e.g. in the political structure "lay" and "professional" knowledge are more or less in a state of equilibrium. In the systems of production organization the professional principle (professional knowledge) is the determining factor.

The "professional" type of knowledge and its character of the members of the administrative and productive-organizational systems are determined by the position they occupy in the social division of labour. Specialization reinforces professionalism on the one hand and conditions for "professional narrow-mindedness" on the other.

Bourgeois organizational theory draws a sharp line between professional and administrative professional knowledge. Marxist theory does not accept this juxtaposition, however, intends to establish the specialities of the types of knowledge of those working in different administrative systems.

I

1. There is a problem hidden in the juxtaposition or co-ordination of democracy and competency recently discussed from several aspects in social sciences. There are even studies which carry things to extremes by putting the question: democracy and/or bureaucracy. The analysis of the problem from the point of view of social organization might as well begin by concentrating on the problem of competency, thus reaching soon a point attained by others

studying the system of bureaucracy. *We do not identify the problem of competency with that of bureaucracy, still we shall try to show certain similarities and overlappings between some elements of the two approaches to the problem.*

Actually the problem has become the centre of scientific interest to a high degree in both the socialist and the western world. In all probability *objective social and political causes* may account for this interests. Among the scholars of socialist social sciences and the practical leaders of socialist institutional organization the number of those regarding organization of administrative character as the precondition of competency is increasing. The problem may be termed as "new", still on the other hand it is as "old" as Marxism itself. The historical dispute on the valuation of organization built upon the principle of democracy and competency (administrative principle) has well definable *central issues*. There were periods in the development of Marxist theory when there were open clashes about these complex questions. Later caution became the characteristic mark of the discussion of the problem: the professional parlance used in the debates was often symbolical and hard to grasp. Recently the question is tackled with increasing audacity. Without going into details, we shall outline here, at least by way of some of the important phases in the historical development of the Marxist discussion on the relationship between democracy and competency (administration, bureaucracy).

a) The birth of the Marxist concept of bureaucracy goes back to the middle of the 19th century. The "young Marx" dissociating himself from Hegel in the forties laid down the scientific bases of the Marxist concept of bureaucracy.[1] Although there are many who do not qualify this as a "typically" Marxist concept on bureaucracy, as if later Marx had harboured other doctrines. In our opinion there is no essential contradiction between the concept of bureaucracy of the "young" Marx and that of the "mature" Marx.[2] Marx in his later statements on the problem relied upon the notions of bureaucracy adopted

[1] Marx discusses the social and philosophical aspects of the problem bureaucracy on a theoretical level in his *Critique of Hegel's* "Philosophy of Right" written in 1843. The concrete manifestations of German bureaucracy are analyzed in his work *Justification of the Moselland Reporter*, in like way written in 1843. Both works have been published in Vol. 1 of the Hungarian translation of the works of Marx and Engels (Budapest, Kossuth Könyvkiadó, 1957, pp. 203—335; 171—192). In his analysis of the works written by Marx in 1843 Attila Ágh writes that "Marx was looking for, and found, an opportunity for the radical criticism of the bureaucratic political organization, i.e. after the study of the poor classes, feudalism and the press he dealt with the problem of bureaucracy on a higher level by making use of the experiences of his age, and by integrating them into his work." Ágh, A.: *A fiatal Marx történetfelfogásának fejlődése a Rheinische Zeitung-periódusban.* II. (Development of the concept of history of the young Marx in the period of the Rheinische Zeitung. II.) Magyar Filozófiai Szemle, 6/1969. p. 1100.

[2] For the debates on the appraisal of the "young" Marx cf. Althusser, L.: *Principal periods of the development of Marxian thought. Sketch.* Published in Althusser, L.: *Marx — the revolution of theory. Studies.* (Hungarian edition published in Budapest, by Kossuth Könyvkiadó, 1968. pp. 79—80.) The opposite opinion has been set forth with skill by Semprun, J.: *Political economy and philosophy in Marx's Grundriß.* (Hungarian translation in Magyar Filozófiai Szemle, 6/1969. pp. 1034—1035.)

by the "young" Marx. On the other hand, already in the beginning of the forties the opinion of Marx about bureaucracy departed from all contemporary and subsequent bourgeois notions.

The opinion of Marx and Engels about bureaucracy outstripping bourgeois professional learning, and within it the critical valuation of bourgeois organizational formations, shows certain similarity to the extremes of bourgeois *belles-lettres* at most. Balzac "instinctively" depicted — by using literary and artistic means — bureaucracy somehow similar to Marx. For that matter the intuitive picture Balzac gave of bureaucracy was above the level of the bourgeois professional concept and valuation in that age.[3]

b) The second great wave of disputes about bureaucracy swept over the world of those studying the question at the turn of the century. By that time the Marxist and the bourgeois notions of bureaucracy broke away from each other completely. On the one hand the disputes went on within Marxism, and on the other, between the two ideological approaches to the problem.

At the turn of the century Marxist theoretical literature was, like in many other respects, in a state of confrontation between true, orthodox Marxism and the reformist tendencies. The most prominent figures in the dispute were Lenin and Kautsky on the one side, and Bernstein and the English Fabians (Sidney Webb etc.), on the other.[4] This phase of the purely theoretical dispute on bureaucracy was closed down by a "later" classical summary, viz. Lenin's *State and Revolution.*

In this period, in "pure" bourgeois sociology, which consciously dissociated itself from every Marxist thesis, such impressive theories of bureaucracy were formulated as that of Max Weber.[5] In sociology it was Pareto who against the notion conceiving bureaucracy as an "ideal type" brought forward the social *risks* implied in bureaucratic organization. The writings of this true artist of *belles lettres* even at that time surpassed by far bourgeois professional concepts. Ominous presentiments associated with bureaucracy were expressed by Franz Kafka in a classical manner.

c) In the socialist countries the third phase of the disputes on bureaucracy may be reckoned from the *XXth Congress of the Communist Party of the Soviet Union.* However, it took about ten years before the dogmatic repercussions hampering the open discussion of the problem could be overcome and the free confrontation of opinions could come into action on a truly theoretical plane.

[3] Balzac shows a classical portrayal of the French bureaucracy in his *Civil Servants*, the portrait is at the same time characteristic of all bourgeois bureaucracies.

[4] For the debate on bureaucracy of that period see WEBB, SIDNEY—WEBB, BEATRICE: *Labour democracy* (Hungarian edition published in Budapest, by Grill Kiadó, 1909. 350 pp.)

[5] WEBER, MAX: *Die drei reinen Typen der legitimen Herrschaft.* (Published in WEBER, MAX: *Soziologie — weltgeschichtliche Analysen — Politik.* Stuttgart, Alfred Kröner Verlag, 1964. pp. 151—166.)

The "new" Marxist interpretation of bureaucracy began in the spirit of return to the "real" Marx. It was by no means accidental that in a large number of socialist countries the different notions of bureaucracy as conceived by the "young" Marx moved into the focal point of Marxist sociological research independently of one another, often even without the knowledge of the work done by the others. On the whole Soviet, Polish, Czechoslovak, Hungarian etc. studies on the causes and origins of bureaucracy and the chances of its sociological exploration were written or published at about the same time.[6]

The dispute within Marxist literature so to say suppressed the theoretical struggle against bourgeois notions. There is nothing odd or inexplicable in this. The conservative interpretation of bureaucracy could add little that was new in it to its previous trend of thought. On the other hand in Marxist re-interpretation of bureaucracy no such universally approved notion of bureaucracy had been formulated that would have met theoretical exigencies and would have had a serious impact on a considerable part of scientific public opinion.

d) In this historical and environmental general survey a few words are to be said of how the problem was exposed *in Hungary* in certain studies during the latter years. The problem was brought forward in a most decisive form by Erdei in a study published in Társadalmi Szemle.[7] A whole series of studies have dealt with the problem from a variety of aspects. Rezső Nyers too dwelt upon the question in his article "A gazdasági reform társadalmi kihatásai" (Social effects of the economic reform).[8] In a somewhat different approach to the problem questions were raised by Dr. Tibor Vámos in his paper "A technokrácia egy 'technokrata' szemével" (Technocracy with the eyes of a "technocrat"), which could safely be regarded as a contribution to the debate.[9]

In *sociological* literature the well-known studies of Hegedüs provoking extensive debates on the problem dealt from several aspects with the contradiction between the "lay" element and the expert manifesting itself in manage-

[6] See e.g. STANISZKIS, J.: *Marks o administracji panstwowej* (Marx on public administration). Studia Socjologiczne Kwartalnik. 4/1969. BERTELMANN, K.: *Ke vztahu samosprávy a byrokracie* (Relation of self-administration and bureaucracy). Pravnik, 1/1970. pp. 1–10.

On the 100th anniversary of Lenin's birth a number of studies dealt with these problems. Cf. e.g. SYLWESTRZAK, A.: *Lenin o birokracji* (Lenin on bureaucracy). Panstwo i Prawo, 3–4/1970. pp. 468–479. BURDA, A.: *U podstaw leniniwskiej nauki o aparacie panstwa socjalistycznego* (The foundations of Lenin's teachings on the socialist state machinery). Panstwo i Prawo, 3–4/1970. pp. 419–429.

[7] ERDEI, F.: *Szakszerűség és demokrácia* (Competency and democracy). Társadalmi Szemle, 5/1967. pp. 3–14.

[8] NYERS, R.: *A gazdasági reform társadalmi kihatásai* (Repercussions of the economic reform on society). Társadalmi Szemle, 3/1968. pp. 7–21.

[9] VÁMOS, T.: *A technokrácia egy "technokrata" szemével* (Technocracy with the eyes of a "technocrat"). Társadalmi Szemle, 1968. No. 3, pp. 7–21. A comment on this paper has been published by SCHMIDT, P.: *Szakszerűség és "laikus demokrácia"* (Competency and "lay democracy"). Társadalmi Szemle, 7/1968. pp. 55–61.

ment, public administration etc.[10] In addition to the literature opposing the doctrines of Hegedüs (Vilmos Meruk, Arthur Kiss, etc.)[11] attention should be given to the works of Lajos Szamel, which embody one of the best known legal interpretation of bureaucracy.[12]

Literature on science organization and the sociology of science dealt profusely with antithesis between democracy and competency. Discrepancies in opinions appeared in particular in the appraisal of the advantages and disadvantages, the values and deficiencies, of the "research worker" and "manager" type of leading scientists. Also the debate on whether "small science" or "big science" affords better opportunities to the creative mind is to be mentioned here.[13]

Philosophers too published a number of studies on the basic questions of the theory of state, and within it on the relations of democracy and bureaucracy.[14] With slight exaggeration the statement may be made that during the latter years there has hardly been a publication in sociology of general content which has not raised a few problems as to the relationship between democracy and competency (administration, bureaucracy).

Examples taken from political, sociological, administrative literature and that on science organization which do not embrace at all the whole literary material associated with the problem, make it clear that *some sort of problems have matured in their interrelations which in the earlier works of sociology were unknown or were living in a latent form at most.* In the following an attempt will be made to answer the question: what is the historical, social and political

[10] HEGEDÜS, A.: *A tudományos kutatás szakigazgatásához* (On the administration of scientific research). Magyar Tudomány, 7—8/1967. pp. 504—511. —: *A társadalmi fejlődés alternatíváiról* (On the alternatives of social development). Kortárs, 6/1968. pp. 843—854.

[11] Several articles have been published arguing the statements of Hegedüs, or supplementing them. E.g. MERUK, V.: *A szociológiai oktatás eszmei tartalmának tisztázásához* (To the clarification of the ideological content of lectures on sociology). Társadalmi Szemle, 5/1968. pp. 37—47, No. 6. pp. 24—31.

[12] SZAMEL, L.: *A bürokrácia és a bürokratizmus problémái szocialista viszonyok között. Jubileumi tanulmányok* (Problems of bureaucracy and bureaucratism under socialist conditions. Jubilee studies). Edited by Tibor Pap. Pécs. Tankönyvkiadó, 1967. pp. 333—379. To this subject refers the study *A szocialista demokrácia és a bürokrácia* (Socialist democracy and bureaucracy) by the same author. Társadalmi Szemle, 7—8/1966. pp. 59—71.

[13] The discussion of science organization has also been launched by Professor Hegedüs. See TAKÁCS, J.: *Kutatásszervezés és kutatásigazgatás* (Research organization and research administration). Magyar Tudomány, 3/1968. pp. 172—178. WIGNER, J.—ÁKOS, K.: *A tudomány növekedése — kedvező kilátások és várható veszélyek* (Growth of science — favourable outlook and possible risks). Magyar Tudomány, 5/1968. pp. 304—318.

[14] See e.g. TORDAI, Z.: *Állam, szocializmus és demokrácia* (State, socialism and democracy). This extensive study has been published in Magyar Filozófiai Szemle, 2/1970. pp. 247—283. The well-known Hungarian historian Tibor Hajdu draws interesting conclusions from this study in course of his appraisal of Lenin's contribution to the theory of state. See HAJDU, T.: *A szocialista állam lenini elméletének történetéhez* (To the Leninist theory of the socialist state). Magyar Filozófiai Szemle, 2/1970. pp. 205—233.

importance of the discussions of the problem which have recently grown more and more pointed.

2. At the time of the establishment of the popular democratic system in Hungary and the establishment of socialist power the problem extensively discussed in political literature was the antithesis between *democracy* and *dictatorship*. According to a more or less generally accepted opinion this problem belongs to the categories of the *political system*.[15] According to one of the interpretations what is to be understood here is the method of government of the ruling class and its primary organizational form, viz. the party. Naturally democracy and dictatorship as the method of exercising power may be studied also in the structure of the state organization and in the operation of its organs.

At the outset of socialist transformation, when the power of the exploiting classes had been broken, no tension manifested itself between democracy and "competency" (administration). The functions of the democratic forms were in the centre of the social organization to an extent that requirements of competency unambiguously became subordinated to them.[16] After the former ruling classes had been crushed, the problem of democracy and dictatorship was confined to the discussion how the new ruling class had to organize the sovereign power of its own. Consequently on both the level of the state power and state administration the structure of the state became more and more composed from "lay" elements in the leading sectors. Democracy and dictatorship as problem of organization mainly manifested themselves in the manner how the ruling class and its allies exercised power and how they shaped the earlier governmental machinery by introducing certain organizational measures. The working class and its allies occupied the majority of the basic political posts (the representative organs) of the State, i.e. the organization became a "proletarian-lay" one.[17] The structure of public administration was strictly subordinated to the representative organs and the key positions of management were in a like way taken by the delegates of the new class. The former administrative machinery remained, however, its employees became assimilated to the new situation, and inspired by their good instincts denied or minified their values arising from their "character of professionals".

[15] As to the notion of the political system cf.: PÉTERI, Z.: *Az államformaelmélet alapkérdései* (Fundamental questions of the theory of the constitutional form). Budapest, 1969. Chapter IV. Further *Állam- és Jogelmélet* (Theory of state and law). Edited by SAMU, M. (Budapest, Tankönyvkiadó, 1970. pp. 165—168.)

[16] "In the period of the intensified class struggle, of the large-scale revolutionary actions", writes Ferenc Erdei, "in Hungary e.g. in the period of the struggle for the worker-peasant power and the dictatorship of the proletariat, the postulate of competence had unconditionally and unanimously been subordinated to the political postulates of democracy". ERDEI, F.: op. cit. p. 13.

[17] Following upon the year of the change . . . "politicians and 'laymen' giving expression to the interests and the will of the majority of society came into power." SCHMIDT, P.: op. cit. p. 57.

In the initial phase of socialist transformation there was no reason for fearing distortions owing to "exaggerated competency", bureaucracy, this typically disfunctional form of manifestation of the administrative organization, in the organizational mechanisms of the country. It was exactly disfunctional phenomena of the opposite sign that were responsible for the tension. At that time democracy had to be cured of its infantile disorders, which in a certain sense had their origin in the "hypertrophy" of the democratic forms, in the professional (administrative) *unbalance* of the "lay" element.

Political distortion concomitant of the cult of personality, however, soon elicited the "early" trends of bureaucracy. The "youthfulness" of the mechanism of Hungarian popular democracy, and its elasticity, could better compensate the tension of bureaucratism. Neither was there a public feeling as if the political problems were due to the extreme professionalization of the mechanism. Notwithstanding the existing bureaucratic errors and techniques the administrative mechanism was neither in the party nor in the governmental organization powerful enough and organizationally isolated as to constitute a risk to the weight and authority of the democratic organizations. The contradiction manifested "within democracy" itself. The positive social forces fighting the distortions knew that any improvement in this field depended only on the outcome of the struggle between "laymen".

To draw theoretical conclusions, in the first place, certain features of the development of the *state organization* should be taken into consideration. Although notwithstanding the formal unrestrictedness of their competence the actual right of decision of the representative organs was not extensive, still there existed a conviction that the functions of the legislation and the councils would sooner or later be expanded and they may occupy the position allotted for them by statutory law. Hence in the first phase of the development of the socialist state and society, notwithstanding the errors, the establishment of the "proper ratio" between the democratic ("lay") and administrative (professional) elements of the mechanisme was expected. The current theory of the organization of society clearly formulated the thesis: *In socialism the democratic forms are primary*, and the goal is that these draw the administrative organization under their actual guidance.

The policy intended to overcome the negative influence of dogmatism and the measures based upon it, were aimed at the elimination of the contradiction between the classical Marxist principles of the organization of society and the incorrect political organizational practice. As it was said, democratism would be filled with content after the elimination of this contradiction, and the establishment of the proper ratios between the representative and administrative types of activities. The clearest formulation of this scheme was Act X of 1954 on Local Councils. Accordingly throughout the years as to the development of the system of local councils the improvement of the corporate

organs (council, committees of the councils, forms of the public relations of the councils, etc.) became the focal point of the activities of the state organs of higher degree.[18] Simultaneously with this, however, the establishment of the legal foundations of the local administrative organization began.

From the closing years of the fifties onwards the regulation of the position of the councils *concentrated gradually on the administrative mechanism.* This shift found expression also in the change carried out in the form of regulation of the position of the local councils. Instead of *Acts* and *Law-decrees* bringing under regulation the position, function and scope of authority of the corporate organs government *decrees and resolutions* concerning public administration by councils, or *orders* and *instructions* of Ministers controlling the specialized organs of the council became the principal means of institutionalization. The superior administrative organs specified the functions of the local administrative agencies, their competence, structure and method of procedure on a more and more detailed way. Compared to the earlier phase at the middle of the sixties the development of the democratic (authoritative-corporate) institutions often appeared as a mere theoretical problem. In the practice of statutory regulation attempts at the development of these organs by legal means came for the time being to a standstill. The problem of democracy and competency (in the organization of local councils this contrast appears as the council as a corporation on the one hand and the administrative organization of the councils, on the other) *was recently raised* in course of the development of the mechanism of councils being brought to the surface by the momentum of the large-scale expansion of public administration.

The example taken from the continual transformation of the organization of local councils is as a matter of course merely one of the many instances demonstrating the strengthening trend towards the "preponderance of the administrative aspect". Actually in the party organizations, in the central organs of state power and state administration, in the Trade Unions as well as in the Communist Youth Organizations the question have been raised even nowadays what may be considered the specific functions of the "democratic" (corporate) organs on the one hand and of the administrative ("professional") organs on the other, and of how the proper ratios of the two elements should be established for the sake of the efficient operation of the particular organs.

3. Before going into the analysis of the ideas of the classics of Marxism concerning this problem, attention should be given to the question of terminology. The antagonistic pair of "democracy" and "competency" is of a more general nature than the meaning of these terms in current usage, i.e. the terms

[18] Accordingly in political sciences works associated with the problem of "democracy" predominated. Cf.: *Bibliography of Hungarian Legal Literature. 1945—1965.* Ed.: Nagy, L. Budapest, Akadémiai Kiadó, 1966.

do not express the essence of the antithesis with proper accuracy. The antonym of "competency" is not "democracy", but "laicism". These concepts have their origin in the *existence or assumption of two different kinds of "knowledge"*. On the other hand, if the problem is seen from the organizational aspect and not from the grounds of knowledge, then the antonym of "democracy" will become the "administrative" type of organization. In literature this pair of antonyms is often expressed by the juxtaposition of the categories of *corporate* and *individual* organs. The statement may thus be made that in the specialized branches of science, in Marxist sociology, theory of state and state law, administrative law, science organization etc. specific, often very divergent terminologies have developed. We have to accept this terminology to a certain degree, still the creation of a certain systematization in the use of the various terms appears to be highly desirable. Starting from the Marxist sociology of organization "democratic" forms should be contrasted with the "administrative" ones.

The terminology of bourgeois sociology established in connection with these relations leads to another situation in this context. This terminology differs from the Marxist one not only in so far as it derives from an ideology having its roots in fundamentally different social and economic conditions: the conceptual system of this terminology at the same time reflects its origin in social and historical conditions differing by the particular states. It is by no means accidental that in bourgeois sociology the problem of "competency" is attached to *"bureaucracy"* as the *"ultimate form" of the bourgeois organization of society*. Whereas in the socialist world the democratic forms constitute the starting-point, the bourgeois sociological approach to the problem rests on the bureaucratic organization. In most of the organizational sectors (production, politics, etc.) the bourgeois organization of society has reached the stage of the denial, elimination, or limitation of democracy. Bourgeois ideology reflects this actual state of social organization. The problems of the "professional", "specialized" etc. organization in any event are predominant in bourgeois sociology to the extent that compared to the literature dealing with them the literature of the democratic forms appears to be rather meagre.

4. Marx in his *"Critique of Hegel's Philosophy of Right"* described the types of knowledge corresponding to the various forms of organization in a truly classical way. While criticizing the Hegelian concept of the theory of state he dealt in detail with the bureaucratic organization and the "bureaucratic knowledge" associated with it. It was quite natural that a theorist of the bourgeois system like Hegel started from the idealization of bureaucracy. Long before Max Weber, Hegel consistently demonstrated that under bourgeois conditions bureaucracy was the final form of development of the political organization of society, *this organizational form was the "best possible" structural solution*. Marx accepted this tendency of the Hegelian dialectics of the development of society, still he

demonstrated that the "most perfect" state of organization was the product of dialectic antimony. Marx did not criticize Hegel on the ground that his theory had reflected the reality of bourgeois society in a false light. Marx emphasized on several occasions that Hegel had undoubtedly described the empiric state of the times correctly.[19] Marx thought that the critique of the contradiction concealed behind objective bourgeois conditions was essential. He "righted" Hegel's adoration of "bureaucratic knowledge" exactly because he could demonstrate that *this "perfect" professional knowledge had lost its function in the service of society.*[20]

Marx calls "professional" knowledge "sacred" knowledge. In contradistinction to it there is "lay" or "profane" knowledge. This pair of antonyms and the variety of designations demonstrate by themselves that *Marx did not tie these two types of knowledge merely to the forms of political organization.* The duality of "profane" and "sacred" has its origin in religious life and the affiliation to churches. *Even there this is tied to two types of organization.* Hence ultimately Marx considered these two "types of knowledge" in any organizational system the concomitant of two types of organs. In his work referred to earlier, however, he took the examples of "bureaucratic knowledge" before all from the typical character of knowledge existing within the organization of the state.

In the "professional" knowledge of the bourgeois organization of state administration the reflection of bourgeois reality was turned upside down. As Marx put it, bureaucracy was according to its *essence* the "State as formalism", therefore even according to its *end* it was the true end of the State, i.e. before bureaucracy itself appeared as an end directed *against* the State. Bureaucracy regards itself as the ultimate end of the State. Since bureaucracy made its 'formal' ends the content of itself, it would clash everywhere with the 'real' ends. Therefore bureaucracy was forced to present the formal as content, and the content as formal. The ends of the State turned into the ends of the bureau, and vice versa the ends of the bureau turned into the ends of the State.[21]

The manner how Marx analyzed the trend of thoughts of the employee of the "professional" sector of the political organization is of extreme interest. He says that "Bureaucracy is in the possession of the essence of the State, the spiritual essence of society, these are its *private property* . . . As regards the individual bureaucrats, the ends of the State become their private ends, the

[19] MARX—ENGELS: *Works* (Hungarian edition) Vol. 1. Budapest, Kossuth Könyvkiadó, 1957. p. 254.

[20] An interesting analysis of the Marxian ideas of the "official mind" is that of STANISZKIS, J.: The outstanding characteristic of the bureaucratic mind is that the instruction which according to the assumption should be the means of activity, becomes *an autonomous end.* STANISZKIS, J.: op. cit. Studia Socjologiczne, 4/1969.

[21] MARX—ENGELS: op. ci±., p 250

drive for higher posts, career-making . . . True science will appear as being void of content, in the same way as real life will appear as being dead, truly this imaginary science and this imaginary life count as essence."[22]

"Sacred", bureaucratic knowledge is distinguished by some sort of a qualifying feature from the stock of knowledge of "lay" people. The "natural" selector and qualifier of the *professional* organization is the *examination*. Can "State knowledge" be gauged by the one method or the other? Marx considered all knowledge relating to the essence of the State the property of any "layman", for "essential 'state knowledge' is a condition in the absence of which man would live outside the state, shut up from the air itself". Exactly for this reason, as Marx pointed out, "in a reasonable State an examination is wanted to become a cobbler rather than to fill the post of an executive civil servant, for the art of the cobbler is a quality without which anybody may be a good citizen".[23]

The "examination" establishing the possession of "sacred" knowledge in reality means the "title" for crossing over to another organizational category. Marx underlines that testing State knowledge by an examination has its origin in the circumstance that the person chosen by the criterion of "professionalism" should enjoy certain privileges with the appearance of legitimacy. "The 'examination', he says, is but a formula of freemasonry, the recognition of the knowledge of citizens as a privilege . . . the examination is the bureaucratic baptism of knowledge, the official recognition of the *transsubstantiation* of profane knowledge into sacred knowledge. (At each examination it is understood that the examiner knows all.) We have never heard of Greek or Roman statesmen passing examinations."[24]

II

In each organizational system the segregation of the functions of the layman and the professional expert and the designation of their specific task are questions of primordial importance. For surveying the organizational sectors of social reality from this point of view the outlines of three possible solutions may be accepted.

[22] Ibid., p. 251.

[23] Ibid., p. 254.

[24] The comparison and appraisal of "profane" and "sacred" knowledge in this sense is known also outside the Marxist theory. In bourgeois philosophy of society, in particular in the Anglo-Saxon world doctrines have emerged according to which the "lay" has priority before the professional. The English philosopher G. K. Chesterton could not be prevented even by his idealism from professing opinions in this question very much similar to those of Marx. According to him democracy is the form of domination of "laymen", for although in political life there is a need for a whole set of special knowledge, still the exercise of power is not a process taking place on a "professional basis". In questions of power no privileged position could be granted to specialists, for here in fact the opinion of the sum total shall prevail.

1. In certain organizational sectors of social relations the predominance of the democratic ("lay") element is striking. In the first place in *party relations* and in general *in the political forms of domination* it is the generally accepted point of view that decisions have to be made independently of the education of the members and their position in the organization, by making good or taking into consideration the opinion of the "whole" the totality of members. The principle of democratic centralism so characteristic of the communist parties does not contradict this statement. Every party organ of higher degree, and in the last resort even the central party organ, take their decisions with reference to the interests and opinion of all the members, even when these decisions are in conflict with the opinion of certain groups or strata in the party. Nowhere is the doctrine accepted in political organs as if the erudition, professional experience, learning of a degree higher than that of the others of a definite category could qualify it for a special position in the procedure of decision-making.

The Leninist principle of democratic centralism, however, opens the path to *professionalism* too in the organization of the party. What is historically new in this organizational structure is that here "professionalism" is not necessarily embodied by a structure of *bureaucratic* type. The members of the organizational system (the party) rely in the first place on the expert knowledge finding expression in the organizations of "social formation" in the strict sense of the word. The *formalized* organizations of expert knowledge are subordinate to the organizational forms of "social expert knowledge" in the totality of the system.

Methods similar to the organizational approach prevailing in party relations may be observed in the political organizations of the State. No separate organizational element is conceivable neither in the supreme representative organs nor in the local government councils which would ensure a privileged position in the exercise of authority on account of professional knowledge. It is an altogether different thing that in the structural reform of the representative organs occasionally the idea arises how a greater weight might be attributed to the professional organizations of society within the general representative system. All these proposals give as a reason of the reform of the representative system that the extensive incorporation of the professional organizations in the representative system would promote *the extension of the mass support of authority*. It would be a grave misunderstanding, if somebody interpreted these principles so as if representation had not to rely on learned persons. A properly operating representation, however, is at least to a certain extent tied to the standard of learning of those represented. Consequently the rise of "professionalism" depends also on the rise of general culture. A "representative" whom the constituents "cannot reach", or vice versa, a representative who cannot make himself understood by his consti-

tuents, carries in himself his potential segregation from society, merely on the ground of his type of knowledge or learning.

The nature of the type of knowledge of political organization also defines that the *members of a democratic organization cannot be "instructed" or "trained"*. A representation is selected so that it either has the necessary political knowledge (e.g. "State knowledge or learning"), or not. This knowledge cannot be taught to "professionals" or "experts", for the holders of professional knowledge want to teach the membership of democratic organizations which — in want of knowledge — ought not to have been selected. In a corporation the clear-cut segregation of professional knowledge from lay knowledge is a sign of the appearance of the tendency of bureaucratization.

2. In certain sectors of social organization a certain state of equilibrium between "lay" and "professional" knowledge is considered the ideal solution.[25] In public administration or in the governmental machinery as a whole a system balancing the two elements has developed. There are two patterns of this balancing system. In fact the establishment of "types" is based upon the integration of two structural categories in different systems.

a) In the first pattern the *representative* agencies are accomodated on the *one side of the plane*, whereas the *other side* is occupied globally by *administration*. In this pair of antonyms representation stands for the "play" category, and administration for professionalism. There will be a state of equilibrium between the two categories when both perform their established and regulated functions. As a matter of course in the socialist social and political development there cannot be always an equilibrium. Just on the contrary: as a result of particular dialectics of development sometimes the one, sometimes the other side will play a decisive part. At the time when the foundations of socialism were laid, as it has been outlined earlier, the primary aim of regulation was the stabilization of the representative organs. It is a characteristic feature of Marxist dialectics that the *administrative organization* cannot unfold itself and *assume a definite shape fully unless it turns against its "mother", the representation*. After the administrative structure has grown to a system a "state of equilibrium" might come into being where the tensions (so-called "bureaucratic tendencies") accumulated during the period of the expansion of the administration will relay. Marx in his *Critique of Hegel's "Philosophy of Right"* called

[25] Ferenc Erdei too believes that the chances of further development lie in the establishment of the proper ratios between the two sides of the mechanism of councils. On the repercussions of the reform of the economic mechanism, at that time *in statu nascendi*, on the organization of councils he wrote: "The debates preparing this (viz. reform) will in all probability unfold in two directions, the postulates of competency will be given prominence, on the one hand the reinforcement of democratization will be emphasized on the other. Both opinions may receive support in the course of the required reform of the law . . . only the dialectic unity of the two can be an acceptable solution." ERDEI, F.: op. cit. p. 11.

attention to the circumstance that while bureaucracy in the phase of its development waged war against its own "existence" (representation or corporations) at the high level of its development would contribute to the institutional development of representation.[26] In each organizational sector the periodicity of the development of the "lay" and professional organizational elements have to be studied separately and accordingly decision will have to be made which is the element the development of which is necessary to achieve a state of equilibrium before long.

b) In the other variant of the balancing pattern the equilibrium between representation and administration rests on an *"intermediary element"*. In the central political organization this function is performed e.g. by the Council of Ministers, in the system of the local councils by the Executive Committees. This construction in its essence does not rely on the balance of antitheses: *balancing and the establishment of the proper ratios are the tasks of the central organs.* The pair of antonyms of "democracy" and "specialized organs" is formed on the one side by the representative organ, and on the other by the sectoral administrative organs. Still the mutually conflicting effects are "balanced" through the active insertion of administrative organs of general authority. This pattern of balancing formed by three elements theoretically cannot operate as a *balancing system* in the true sense of the word. In the arrangement of the elements of the pattern in "series" the actual power position does not take shape in the play of the power relations between the representation and the specialized organs: but it depends on the fact that with which side the intermediary element (the administrative organ of general authority) "takes sides".

In point of fact the term of balancing system cannot be applied to this pattern: in fact if in a system of three elements (legislation government and specialized organs) the authoritative preponderance of the mid-element prevails, there legitimately or *de facto* a *single-centrism* exists. It is another question that in a definite alignment a balancing system can be brought about among the three structural elements of some sort of an organizational system. An example of this is the structural relationship of the central organs as defined by the Constitution of the United States of America. However, here the balance has been brought about in a so-called triangular pattern, and not by a "lineary" arrangement of the organs.[27] In a system of relations

[26] MARX–ENGELS: *Works*, Vol. 1 (Hungarian edition, Kossuth Könyvkiadó, 1957. p. 249).

[27] The separation of the branches of the sovereign power and the principle of their mutual balance is the classical principle of bourgeois constitutionalism. (Cf. BEÉR–KOVÁCS–SZAMEL: *Magyar Államjog* (Hungarian State Law). Budapest, Tankönyvkiadó, 1960. p. 38.) Anglo-Saxon constitutional systems consider this solution a particularly perfect one. The question is a favourite subject of bourgeois literature on constitutional law. Setting out from the critical remarks of Marx the socialist theory of state rejects the concept of the separation of the branches of the sovereign power.

of this type each angle is determined or balanced by its relation to the other two angles.[28]

3. In the third group of organizational system the "professional" principle ("professional" knowledge or learning) is the *decisive*, dominant element. At present systems of this type may be conceived as such *where the autonomous competence of the "democratic" (corporate) organs has withered away, or has been shifted to an organizational system of another type*. "Professionalism" or the principle of "professional" organization determines the organization of modern industrial enterprises. The traditional democratic elements of the organization of production which were in operation on the primitive level of the development of society (in handicraft industry within the guild system in the special organizational forms of joint farming in agriculture, such as the Mark, Mir, Zadruga, etc.) disintegrated in the wake of modern technical development. In the industrial enterprises of capitalism on the proprietary side the shareholders, then the "lay" members of the boards of directors have been thrust to the background in the active management of the enterprise. The typical "professional knowledge" of the capitalist enterprise is given expression by the *manager*.

Naturally the "lay element" (the "nonprofessional" members of the boards of directors) has a certain influence on the uppermost level of the enterprise. However, even in the supreme management of the productive organization persons in possession of the "sacred knowledge" have gradually expanding functions allotted to them. On the other hand in the system of the private ownership of the means of production the *worker* performing *activities productive has no word to say* in the management of production. At most what is called the right of participation is due to the "democratic element" in this mechanism.

In the socialist organization of industrial production the manager representing the State is or was a "layman" as regards his social position, still in the structure of production he gives expression to professional values, and more and more "professional" aspect is reflected by his position (as in general employment by the State is more "professional" or "specialized" than a post hold in a social organization). In the management of the socialist organization of production the "lay values" recede to the background and are shifted to other organizational frameworks. All the same political or state leadership tries to make use of the knowledge of the worker originating from his position of a "layman" through a number of forms. Such forms are the *production conference, the brigade (team) movement, the innovation movement*, etc. All these do

[28] Otto Bihari in connexion with the functions of the agencies of the administration justice, — and not in relation to the power and administrative organs, — discusses the advantages hidden in the balancing system. See BIHARI, O.: *A szocialista államszervezet alkotmányos modelljei* (The constitutional models of the socialist state organization). Budapest, Közgazdasági és Jogi Könyvkiadó, 1969. p. 398.

not want,-however, to bring to a standstill the trend according to which the function of the "professional" leaders is the *organization* of enterprisal work on *a scientific level.*

"Lay knowledge" thrust out of the function of guiding production turns up in *party* activity guiding the mechanism of production. The organizational framework of *general* workers' democratism is provided by the *Trade Union.* To this such potentialities of the gratification of "lay" inclinations to guidance may be added as the youth organizations, the women's organizations, clubs for entertainment organized within the enterprises (or attached to them). Hence the worker compelled to relinquish the leadership of the organization of production is amply recompensed in other organizational sectors. The modern industrial organization of production, however, restricts more and more the role of "lay" knowledge, and changes over gradually to the form of those in possession of "sacred" knowledge.

III

1. In the foregoing we have demonstrated that there are systems which in their entirety may be qualified as "lay", whereas there are others which in relation to them are "administrative" (specialized or professional) ones. It is a self-contained topic to study how the so-called lay systems (e.g. the council corporations) transform the consciousness and habits of the "non-professionals". Recently, however, even greater attention is paid to the problem, what categories of members of the organization can be set up in the so-called administrative types of systems and in the professional sections of "lay" organizations, and what are the relations of the consciousness and attitude of the types corresponding to these categories to the organizational form.

Within the organization each self-contained categorie may be associated with the development of the division of labour. In the majority of the socialist countries the administrative systems are conspicuously differentiated and well developed. Nevertheless these macro-structures "grew out of nothing", because the socialist revolution destroyed a large portion of the administrative superstructure of the earlier division of labour.

Naturally the regularities of the division of labour manifest themselves also in the "lay" organizations. The words of Marx regarding the category-shaping effect of the division of labour will hold true of any social division of labour of any organizational system. He says that as regards his abilities a carrier differs by far less from a philosopher as the shepherd's dog from a greyhound. It is the division of labour which has dug an abyss between the two.[29]

[29] MARX: *A filozófia nyomora* (The poverty of philosophy). Budapest, Szikra Kiadó, 1952. p. 129.

Following from the character of the type of organization, the division of labour prevailing within the administrative system reinforces the differences, makes those holding various posts conscious of their separate positions rather than does the division of labour within the "democratic" organizations. The higher developed the administrative system the more the structuralizing influences affecting the composition of the administrative personnel in a positive or negative sense, as the case may be, come to the fore. The greatest value of the administrative structure is that in possession of a high degree of professional learning it is becoming more and more an efficient machinery. Marx essentially accepted the thesis of early bourgeois national economy even on the "explanation" of the negative effects of the division of labour. As a matter of fact already this school recognized that in the division of labour the same cause produces the advantage as gives birth to the loss.[30]

The efficiency of the modern organization is improved by specialization coming into being on the ground of the division of labour. It is the same specialization which brings to the surface the disadvantages. What characterizes the division of labour within modern society, said Marx, is that it brings into existence the specialists and together with them professional narrow-mindedness.[31] I.e. on the one hand "professionalism" is one of the most important promoter of social progress, and on the other it opens the path for a potential deviation from the ends of society. The more specialized an organization is, the greater is the risk involved by "professional narrow-mindedness".

2. Recently in bourgeois sociology and organizational theory the analysis of the relations of the administrative expert and the professionalist is an extensively discussed subject. These categories of bourgeois society defy a comparison with the types of experts of socialist conditions not only because the socialist mechanism is based upon other economic foundations, but also because the socialist administrative system has reached a phase of development which does not coincide with the characteristic period of the present bourgeois administrative system. An attempt at the comparison of the discussions going on in the bourgeois camp on professionalization with certain actual manifestations of the problem in the socialist world would run counter historicity. In a wholly schematic manner we shall now touch upon the method of how the problem of the contradiction between the administrative expert and the professionalist is exposed in bourgeois social sciences.

In bourgeois organizational theory ever since the days of Max Weber

[30] Incidentally Proudhon quoted this idea from Sacy. However, Marx demonstrated that classical bourgeois political economy before Proudhon recognized the importance of this thesis even better than Proudhon himself. (Cf. MARX—ENGELS: *Works* (Hungarian edition), Vol. 4, Budapest, Kossuth Könyvkiadó, 1959. pp. 139—140.)

[31] Ibid., p. 150.

the traits of bureaucracy have always been discovered in competency.[32] It follows from its character that the administrative organization is a professional organization. The typical staff of the administrative organization is in possession of professional knowledge, and although it is seemingly uniform, nevertheless it may be split up into two categories. In a developed administrative system the administrative experts and the so-called professionals become more and more separated from each other. In bourgeois literature of organizational theory the distinction of these two types is in general explained by the difference in the positions occupied by the persons concerned in the organizational division of labour.[33] In addition to this literature emphasizes yet other specific traits.

Bourgeois organizational theory points out that the system of training of the professional and the administrative expert are based upon different principles. In our opinion this is by no means a decisive factor, still undoubtedly there is a certain motivating element to be found in it. Professionals are trained in educational institutions of high level where complex skill is imparted to the trainees. The professional acquires his special knowledge in a system of training which includes this special knowledge in the system of general knowledge.

The administrative expert may acquire his special knowledge in such educational institutions of high standing too, however, from the point of view of the machinery altogether different systems of training are also acceptable, and even desirable. The executive level of administrative systems of any type will favour special methods of training suiting its special organizational ends and functions. Priority is given to forms of training which issue qualify professionals at short notice. Especially curricula of practical use are appreciated, i.e. curricula which arm the trainees with procedural and technical skills needed in their career.[34]

Employees holding executive positions receive their special training mostly in technical colleges or in training or re-training courses. The administrative training systems cannot devote sufficient time or a large enough scope to imparting complex knowledge to the trainees. The administrative training systems may be combined with the continuous performance of work,

[32] A good survey of the various concepts of the role of competence in bourgeois organization is given by MOUZELIS, N. P.: *Organisation and Bureaucracy* (Chicago, Aldine, Second printing, 1969. pp. 15–26).

[33] A selection from the vast mass of bourgeois literature of organization theory dealing with professionalization is given in: *Professionalization* (Ed. VOLLMER, H. M.—MILLS, D. L.) Englewood Cliffs, New Jersey, 1966. An interesting study in this work is that of SCOTT, R.: *Professionals in Bureaucracies — Areas of Conflict.* (Op. cit. pp. 265–275.)

[34] Sometimes was considered mechanical and thought that what would lead to success was the replacement of the old machinery by a "personally new" structure. In particular in the former organization of public administration the struggle was going on for the suppression of bureaucracy "through its elements".

whereas the professional can only acquire the whole system of skills separated — as a rule — from any field work.

An important criterion of the professional is that — as a result of his training — he acquires an internalized guiding mechanism. This means that in the course of training he acquires the general norms and standards of the performance of executive duties. He acquires the ability to select the means needed for the autonomous performance of his functions. In possession of all these, the professional disposes of the deliberative faculty and power of discernment which are required for taking decisions whenever tensions arise between an abstract norm and the actual situation. In possession of general and special expert knowledge the professional perceives his own functions as inherent in his activity aimed at the carrying out of his duty. Since this way of perceiving things will again place him before the dilemma of how to apply the existing norms to an actual situation, his autonomous assumption of responsibility for his decisions will react on him with the force of living experience.

The greatest difference between the administrative expert and the professional lies exactly in their perception of the performance of their functions. The person assigned to the administrative organization, even if he has acquired the whole set of the complex system of faculties, will owing to the position he occupies within the organization be motivated to use a section only of the acquired faculties. He will not simply "forget" the unused portion of acquired knowledge: his frame of mind will be narrowed down, and an inclination will arise in him to make use of the "necessary" portion only of his stock of knowledge. This narrowing-down of the frame of mind of the administrative expert is determined by his affiliation to the formal organization. In this organizational hierarchy the ends have been formulated independently of his co-operation: he does not feel them as his own. The selection of the means for the achievement of the ends will not depend on him in the majority of instances. In the administrative organizations the procedures of the performance of work are standardized, and so the administrative expert sees no potentialities for deliberation, or even has the feeling that this would entail unnecessary risks. Therefore the typical habit of the administrative expert is to conform himself to the instructions, the given ends, the techniques as specified, and mechanical adherence to the means for translating the ends into reality.

The comparison between the administrative expert and the professional in the sense outlined above has set out from items of secondary importance. The distinguishing particularities in fact become manifest yet not the form of training or the different characteristics of the employees but the position occupied in the organizational structure are the decisive factors which separate the two categories. Thus Marxist sociology of organization cannot accept such comparison between the administrative expert and the professional where the professional represents the positive type and the administrative expert is the

one lagging behind and "inclined" to bureaucracy in the pejorative sense of the term. This statement receives support from the failure of bourgeois literature of organizational theory to offer a proper explanation of why a person in possession of complex training will become an administrative expert only, and why despite the special training administrative experts turn into executives capable of surveying the performance of duties in its totality, i.e. executives of "professional properties".

3. In the various phases of the development of the socialist administrative structures the positive and negative effects of the division of labour have manifested themselves in a manner differing from their presentation in modern bourgeois sociology. At the outset of the building up of a socialist society, in addition to the liquidation of the traditional administrative structures, totally or partially, professional organizations based upon a wide social foundation had to be created. Before the creation of well developed administrative systems "professional narrow-mindedness" could not become any serious problem of society. Or still better: at the beginning of socialism war was waged against the "professional narrow-mindedness" developed under earlier bourgeois conditions,[35] for building up a "true", new administrative structure avoiding the revival of earlier errors. In the years following upon the year of change there was no tension between the administrative executives and the professionals in the administrative structures. This had its definite social and historical causes. The socialist revolution placed "laymen" in the executive positions of production, public administration, and first of all in politics. In this situation the "lay" element discharged the functions of genuine professionals. Before the year of change in industrial enterprises and in particular in public administration the professional experts presented typically bureaucratic traits. The party workers (cadres) promoted to executive positions in the beginning lacked the professional knowledge indispensable to modern administration. Considered from a formal, administrative point of view, their value consisted in the circumstance that their way of thinking was not influenced by any hierarchy of formalized organizational system and that no organizational conformism developed in them. The "lay professionals" presented dual characteristics. Potentially the position made the acquisition of professional knowledge possible for masses who were extremely suitable to sum up the "system of the totality" of their tasks, as a result of the influence of social-political factors. Though lacking scientific education, most of them reasoned according to a complex point of view. For the achievement of the new social ends, however, they had to rely on "specialists" whose overwhelming majority was contaminated by bureaucratic habits in the organizational system as it had existed

[35] In addition to those mentioned before, there was a growing number of persons with secondary education in the new strata streaming into the administration.

before the liberation. In course of the struggle against bureaucracy only the leaders or officials on the summits of the various mechanisms were discharged indeed, whereas for the maintenance of efficient organizational operation there was need for the masses of subordinate specialists. The earlier machinery was crushed in the governmental or authoritative branches, mainly in public administration more completely than in the economic structure. Naturally the attitude and working methods of the old experts could not be changed overnight, in either the enterprises or the administrative sector.

In the course of building socialism beginning was a gradually expanding system of the training of "laymen" unfolded. Training was in the first place aimed at the acquisition of "professional knowledge". A situation was brought about where the "layman" disposed of the typical values of the "professional", i.e. of the ability to appraise the administrative processes in their bearing on the totality of social and political relations. It was taken for granted that with the lay-professionals this approach to the problems would not fade away even while going through a special professional training.

Part of the "laymen" appointed to administrative posts acquired professional knowledge in special institutions (universities) serving for the training of professionals, in general in separate training courses (evening courses, correspondence courses). In the process of acquiring professional knowledge effects supervened which jeopardized those values of the social elements introduced to the administrative machinery which derived from their "laicism". The "complex standpoint" characteristic of the "lay" element became endangered by their inclination — acquired during their training — to overestimate professionalism, or in the words of Marx, by "professional narrow-mindedness". This inclination or narrow-mindedness was resisted instinctively by the whole past, and social and historical experiences of the new executives, still — even if not to a high degree — the number of those increased who were unable to free their minds from the structural weight of administration. The higher the administrative organization was where the graduated "layman" performed his functions, the greater was the danger that he would invest professional knowledge with some sort of "mysticism", and that he would come under the spell of specialization. This meant that he would begin to look at the professional problems associated with his scope of employment, torn out of the whole process, wholly from the point of view of his scope of-work.

Later, owing to the rapid increase of the number of administrative posts, "laymen" began to stream into the administrative machinery whose habit was not put to the test in the earlier social and political struggle, or who exactly in this struggle had been thrust back to the second, or third level in the hierarchy. A substantial portion of the "lay" elements who subsequently invaded the middle and lower levels of administration, acquired at the training courses or at other special forms only the procedural or technical knowledge absolutely

necessary to their scopes of work. In this category a by no means negligible number of persons were, in view of their age, or earlier political services, exempted from acquiring the specified qualification.[36]

4. With the development of the socialist organizational mechanisms and the rise of the level of their formal arrangement, also the position of the "lay" executives acquiring qualification changed. The pressure of the administrative structure began to weigh more and more heavily on "layman habit", and the new administrative leaders displayed such negative characteristics as could be compared to the earlier structural effects. The administrative sectors of the socialist mechanisms began to develop at a higher rate and in relatively larger proportions than the administrative structures of the bourgeois states. It was quite understandable that this larger mechanism had a greater determining influence on the "lay" professional than the smaller systems. As a result of the organizational pressure in some of the originally "lay" executives reluctance to take independent decisions, the tendency to shift responsibility, etc. began to appear as a serious problem in a while.[37]

Consequently in these executives the autonomous sense of responsibility gradually wested away, because - as practical experience taught them — only the formal conformism to the office standards was what mattered. In the modern administrative organization the same negative effects of specialization began to turn up as had transformed the workers first in manufacture then in the factory organization, and had in many respects disintegrated their earlier personality. The administrative structures now were about to reach the degree of organization which was characteristic of the factory industry in the developed countries about 100 to 150 years ago. Administration when changing over to a "factory"-like organization alienates the specialist from his work in the same way as the expanding division of labour does. The Marxist thesis is valid also as to the administration: what is characteristic of the division of labour within modern society is that it creates the specialities, the specialists and together with them professional narrow-mindedness.[38]

The socialist administrative structures constitute a phase of development which cannot be skipped, in the same way as specialization in industry is but a transient stage to automatization. In the socialist organization of putting into practice automatization two conflicting tendencies dominate, viz. the endeavour of earlier laymen to acquire "official" professionalism on the

[36] In the years before the introduction of the new administrative mechanism an extensively discussed problem had been the shift of responsibility, or the escape from responsibility. Cf. SZAMEL, L.: *A bürokrácia és a bürokratizmus problémái szocialista viszonyok között. Jubileumi tanulmányok* (The problems of bureaucracy and bureaucratism under socialist conditions. Jubilee studies). (Ed. by Tibor Pap) Pécs, Tankönyvkiadó, 1967. p. 347.

[37] MARX—ENGELS: *Works* (Hungarian edition) Vol. 4. Budapest, Kossuth Könyvkiadó, 1959. p. 150.

[38] Ibid., p. 150.

one hand, and the struggle of those who have acquired "official professional knowledge" against the growing danger of "professional narrow-mindedness" on the other. The contradiction manifesting itself within the administrative systems is resolved by the same factor as counterbalances "professional narrow-mindedness" in the industrial organization. What characterizes division of labour within the automatic factory is, according to Marx, that work has lost all of its special character. Still when all kinds of special development come to an end, the need for universality, the tendency towards the integral development of the individual, will become obvious. The automatic factory eliminates the specialists and professional narrow-mindedness.[39] In our days administrative structures only approximate the goal, and in this state of transition their separation is to a certain degree inevitable. It depends also on elements of consciousness that the negative effects of specialization will in certain periods emerge with greater vigour than in others. In any case as a result of the development of the scientific and technical factors the possibility of the self-liberation of the administrative specialists in the course of the building of socialism will take place under increasingly improving conditions.

Демократия и знание дела

И. СЭНТПЕТЕРИ

В современном обществоведении имеют место дискуссии о взаимоотношении демократии и профессиональной компетентности. Эта проблематика обсуждается однако и в аспекте демократии и бюрократизма. Хотя эти две проблематики не тождественны, все же между ними есть много точек соприкосновения и общих мест. О взаимоотношении демократии и профессиональной компетентности (бюрократизм, административное управление) в марксистской идеологии было немало важных дискуссионных периодов. В Венгрии — точно так же, как и в остальных социалистических странах — за последние годы вышло изрядное количество монографий по этому вопросу, в которых отстаивались противоречащие друг другу позиции.

На предшествующем этапе социалистического строительства в центре внимания политической литературы стоял вопрос демократии и диктатуры. «Администрирование» общественных и государственных отношений выдвинуло на первый план проблему демократии и компетентности, знания дела. Классическое определение о соотношении «несведущего» и «священного» профессионального знания, «бюрократически крещенного» «особого разумения» «причастных» дал Маркс, критикуя гегелевскую философию государственного права. Сущностным определением, детерминантом отношений гражданского общественного организма Маркс категорически признавал несведуещее знание, в противовес Гегелю, идеализировавшему «особое», профессиональное или «священное» знание. «Особое», «государственное» и «начальственное» разумение чиновников — это основа бюрократической организованности.

Тот или другой из двух типов знания может стать определяющим господствующим в той или иной организационной подсистеме. «Несведущее» знание является ха-

[39] A safeguard against the narrowing down of the socialist standpoint is afforded by training system sometimes independent of the professional training schemes, or sometimes associated with them. In the socialist states against "professional narrow-mindedness" the new and earlier preferred personnel is assisted by the Marxist evening courses of the universities, the institutes of superior education and other "informal" methods of training.

рактерным для политической организованности. знание и «особое» профессионального сословное знание «причастных» более-менее уравновешенно наличествуют в административно-управленческих системах, например, в структуре государства. Профессиональный принцип (знание и умение причастных), является определяющим в системе производственных организмов.

Тип и характер «профессиональных» знаний членов, образующих систему административно-управленческих и производственных организмов, определяется их местом в общественном разделении труда.

Специализация с одной стороны усиливает профессиональность, а с другой стороны кондиционирует к «профессиональной ограниченности».

Буржуазная наука организации резко разграничивает два типа знаний, проводит острую грань между профессиональной и административно-управленческой квалифицированностью. Марксистская теория не может принять такое противопоставление, но считает необходимым, чтобы разработать также и специфику типов знаний, присущих работникам самых различных управленческих систем.

Demokratie und Fachmäßigkeit

von

I. Szentpéteri

In der Gesellschaftswissenschaft von heute wird über das Verhältnis der Demokratie und Fachmäßigkeit oft diskutiert. Diese Problematik wird aber auch hinsichtlich der Demokratie und Bürokratie besprochen. Obwohl die beiden Fragenkomplexe nicht identisch sind, gibt es zwischen ihnen doch mehrere Überdeckungen und Berührungspunkte. In der marxistischen Ideologie gab es mehrere wichtige Diskussionsepochen über das Verhältnis von Demokratie und Fachmäßigkeit (Bürokratie und Verwaltung). In unserem Lande, ebenso wie in den anderen sozialistischen Ländern, sind in den letzteren Jahren zahlreiche, sich widersprechende Abhandlungen erschienen.

In der früheren Epoche des Aufbaus des Sozialismus stand die Frage der Demokratie und Diktatur im Mittelpunkt der politischen Literatur. Das Problem der Demokratie und Fachmäßigkeit wurde durch die Umwandlung in die »Verwaltungsähnlichkeit« der gesellschaftlich-staatlichen Verhältnisse in dem Vordergrund gestellt.

Marx charakterisierte in der Kritik von Hegels Staatsrecht auf klassische Weise das Verhältnis zwischen »laischem« und »heiligem« Berufswissen. Marx hielt entschlossen das »laische« (profane) Wissen für den determinierenden Faktor der gemeinschaftlichen Organisationsverhältnisse gegenüber Hegel, der das »Berufs-« oder »heilige« Wissen idealisierte. Das »Berufswissen« ist der Grund für die bürokratische Organisiertheit.

Von den beiden Wissenstypen kann der eine, oder der andere in den verschiedenen Organisationsuntersystemen herrschend werden. Das »laische« und das »Berufs«-Wissen sind in den Verwaltungssystemen, so z. B. in der Staatsstruktur mehr oder weniger in Gleichgewicht. In den Systemen der Produktionsorganisation ist das Fachprinzip (Berufswissen) maßgebend.

Der »fachliche« Wissenstyp und Charakter der Mitglieder der Verwaltungs- und Produktionsorganisationssysteme sind durch ihren in der gesellschaftlichen Arbeitsteilung eingenommenen Platz bestimmt. Die Spezialisation stärkt einerseits die Fachmäßigkeit, kondizioniert andererseits auf die »fachliche Beschränkheit«.

Die bürgerliche Organisationswissenschaft unterscheidet scharf zwischen dem professionistischen und dem Verwaltungsfachwissen. Die marxistische Theorie kann diese Gegenüberstellung nicht annehmen, hält es aber für notwendig, die Spezifiken der Wissenstypen jener Personen auszuarbeiten, die in den verschiedensten Verwaltungssystemen tätig sind.

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Материальная ответственность государств-членов СЭВ за свои экономические обязательства

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Новые типы связей в области производственного сотрудничества, увеличение веса межгосударственных соглашений, облекающих эти связи в юридическую форму, остро ставит вопрос о материальной ответственности государств за выполнение взятых ими на себя обязательств экономического характера. Материальная ответственность государств признается как в теории международного права, так и в практике международных отношений. Материальная ответственность государств подпадает под действие международного права, но имеет ряд таких свойств, которые характерны для сферы экономических связей. Это должно приниматься во внимание при конструировании системы ответственности и применяемых санкций.

Основанием материальной ответственности государств служит факт нарушения договора, отсутствие оправдательных причин для уклонения от исполнения обязательств, а в случае ответственности, предусматривающей возмещение убытков, к этому присовокупляется также и ущерб, находящийся в причинной связи с нарушением договора.

Объекты межгосударственного договора по экономическому вопросу и заключаемых между хозяйственными организациями гражданско-правовых договоров, направленных на реализацию межгосударственного договора, по своей экономической цели хотя и тождественны, однако содержание этих обязательств различно. Содержанием межгосударственного договора обычно является не непосредственное выполнение услуг, направленных на хозяйственную цель, а создание тех экономических условий средствами хозяйственного управления, на основе которых надлежащие хозяйственные организации государства могут заключить и выполнить гражданско-правовые договоры. Система санкций по материальной ответственности государств может быть либо обязанность возмещения убытков, либо уплаты обусловленной на случай нарушения договора суммы в форме квази-неустойки.

В данной статье подробно рассматриваются достоинства и минусы обязательности возмещения убытков, каковые недостатки устраняются санкцией по уплате суммы квази-неустойки, предусмотренной в случае нарушения договора.

Соглашение о материальной ответственности государства может иметь только диспозитивный характер и стороны должны получить возможность, чтобы они уславливались в конкретном договоре либо о неограниченном либо об ограниченном возмещении убытков, либо же об уплате определенной денежной суммы в случае нарушения договора. Ответственность должна строиться или на объективном основании или же нужно установить, высказать презумпцию виновности. В случае соперничества государственной ответственности и ответственности между хозяйственными организациями во избежание нарушения принципа non bis idem более целесообразно реализовать ответственность между хозяйственными организациями.

Споры, возникающие в связи с применением ответственности, должны регулироваться путем уже сложившихся способов. Создание арбитража для решения споров может быть осуществлено только в позднейшей стадии, но в диапазоне от согласования вопросов и до решения споров третейским судом можно себе представить множество вариантов, которые могут применяться с некоторой последовательностью между градациями.

I

Комплексная программа, ставящая своей целью дальнейшее углубление сотрудничества и развитие социалистической экономической интеграции государств-участников СЭВ, предписывает усовершенствование правовых основ сотрудничества. В рамках СЭВ все больший вес обретает юридическая деятельность; стало ясно, что углубление международного сотрудничества, дальнейшее строительство системы его институтов не может обойтись без той организующей силы, которую означает право. Три года уже существует также и организационная рамка этой работы в формы Совещания представителей стран-членов СЭВ по правовым вопросам. Одной из важнейших задач, которая должна быть разрешена Совещанием в ближайшем будущем, является установление содержания материальной ответственности государств-участников СЭВ за обязательства, взятые ими на себя в межгосударственных договорах.

Новые типы связей в производственном сотрудничестве, увеличение веса межгосударственных соглашений, облекающих эти связи в юридическую форму, остро ставит вопрос об имущественной ответственности государств за выполнение взятых ими на себя обязательств экономического характера. До тех пор пока подавляющее большинство межгосударственных экономических договоров касалось внешнеторгового товарооборота, применение санкций в сфере межгосударственных договоров не возникало с таким значением. Ведь межгосударственные соглашения по вопросам товарооборота двухсторонне устанавливают поставочные контингенты, относительно которых одна сторона несет обязательство по поставке, а другая сторона обязательство по приемке.

Во взаимных экономических связях стран-членов СЭВ друг с другом — вследствие наличествовавшего в отношении большинства товаров торгового превалирования — упор делался на поставках. Практика государств стремилась к урегулированию спорных вопросов на основе принципа взаимопомощи и сотрудничества. Если же это, однако, по какой-либо причине не удавалось, происходило то, что в случае неисполнения поставки, а равно в случае отказа в приемке, другое государство не исполняло своих обязательств по поставке, или же по приемке товаров, относящихся в аналогичный по экономическому значению контингент. Это случалось весьма редко, но возможность такого, квази- реторсионного, репрессионального по своему характеру действия до некоторой степени побуждала к точному, исправному исполнению договорных обязательств.

Иначе ставится проблема ответственности государств в различных областях производственного сотрудничества. Производственное сотрудничество требует четкого координирования между отдельными государствами. Добрая часть таких кооперационных связей осуществляется путем совмест-

ного развития, совместных разработок, совместных или же согласованных капиталовложений. Характер этих совместных инвестиций или таков, что новый объект создается на территории одной из стран, но остальные страны-участницы кооперирования вносят материальный взнос для создания нового объекта, либо же каждая из стран-участниц на собственной территории создает такой объект, который находится в вертикальной производственной связи с объектом другой страны, и они совместно представляют собой комбинат. Таким образом создается общими усилиями Чехословацкой Социалистической Республики, Венгерской Народной Республики и Союза ССР олефино-химический комбинат в сопредельных районах трех стран, который будет служить общим целям.

Какая бы форма производственного кооперирования ни осуществлялась, чрезвычайно велико значение того, чтобы каждая из договаривающихся сторон своевременно выполняла взятые на себя обязательства, ибо в ином случае созданный в результате сотрудничества многих стран комбинат не сможет начать работу, и притом и отвлеченные материальные средства, обращенные на кооперирование, тоже, будучи связанными, остаются «омертвленными», и не окупаются. Следовательно запаздывание, упущения или хозяйственные затруднения одной страны приводят к тяжелым убыткам и в другой стране. Умножение числа и веса межгосударственных договоров о сотрудничестве подобного характера придало особую актуальность для разработки материальной ответственности, стимулирующей к выполнению межгосударственных соглашений.

По новому ставится вопрос материальной ответственности государств по мере развития процесса интеграции стран-членов СЭВ также и потому, что одна из целей интеграции состоит в том, чтобы хозяйственные организации государств — в том числе и министерства — поддерживали друг с другом непосредственные, прямые связи. Эти контакты в ряде случаев ведут также и к заключению договоров. Следовательно, расширился круг тех государственных органов, которые могут заключать межгосударственные договоры или соглашения. Эти соглашения впредь могут заключаться не только на уровне правительств, но и на уровне отдельных министерств или иных органов хозяйственного управления. Увеличение числа межгосударственных экономических соглашений влечет за собой также то, что об их исполнении нужно заботиться не только посредством системы требований, зиждящихся на принципах взаимопомощи и сотрудничества, на концепции интернационализма, но наряду с этим также и опираясь на систему правовых санкций.

II

Материальная ответственность государств признается как в теории международного права, так и в практике международных отношений. По

международному праву государство должно нести ответственность за нарушение своих международных обязательств. В рамках ООН в 1958 году была выдвинута инициатива по кодификации международно-правовых принципов, касающихся материальной ответственности государств. Однако эта работа все еще весьма далека от завершения. Наряду с принципиальным признанием материальной ответственности государства в отношении условий и сфер ее применения, а также в отношении самих форм ответственности и в теории и в практике международно-правовых отношений имеются значительные расхождения. Вопреки этому, материальная ответственность государств за нарушение своих договорных обязательств, а равно за причинение ущерба вне договорных отношений признается как в социалистической, так и в прогрессивной буржуазной литературе международного права. Ряд авторов считает эту ответственность одним из основополагающих начал международного права: «Не вызывает сомнения, что в наши дни ответственность государств признается в качестве основополагающего принципа международного права».[1]

О самом принципе ответственности и о значении тех норм, в которых этот принцип получает выражение, советский ученый Д. Б. Левин пишет: «...эти нормы содействуют осуществлению других норм международного права и являются как бы общей гарантией их соблюдения»,[2] направлены на выполнение защитительной функции международного права.

Государства являются субъектами международного публичного права. Поэтому и соглашение, касающееся материальной ответственности государств тоже имеет характер международного права. Наряду с признанием этого положения нельзя, однако, упускать из виду, что суверенное государство в аспекте экономического сотрудничества выступает как организатор хозяйства, и таким образом его договорные связи, возникающие в указанном отношении, носят экономический характер. Поэтому им присущ ряд таких свойств, которые характеризуют экономические связи — и могу добавить — сферу товарных отношений, сферу экономического оборота. Из сказанного следует, что санкционная система этой ответственности не может быть тождественна —, уже и в силу огромного объема стоимости, охваченного договорными отношениями, а также из-за сопряженного с ними большого риска, — системе санкций в связи с несением государством ответственности за выполнение своих прочих международно-правовых соглашений, и в особенности не может быть тождественна с ответственностью, которую несет государство за причинение ущерба, не обусловленного договором.

[1] Eagleton, W.: *The responsability of states in International Law*. New York, 1928. p. 21.

[2] Левин, Д. Б.: *Ответственность государств в современном международном праве*. Издательство «Мо», Москва 1966, с. 7.

Вместе с тем при конструировании этой ответственности нельзя брать за образец и ответственность, возлагаемую в международном экономическом обороте, в торговле, по нормам гражданского права. Нельзя, во-первых, потому, что субъектами этих договоров являются субъекты не гражданского права, а междунардного публичного права, с другой стороны, нельзя и по сущностному содержанию, так как эти договоры выполняются государством, как правило, не непосредственно, путем собственных органов, а через свои хозяйственные организации, располагающие самостоятельной правосубъектностью, с вклинением заключенных этими организациями гражданско-правовых договоров, а также потому, что система условий межгосударственного соглашения, — прежде всего в отношении цен и сроков, — не разработана настолько детально, чтобы на них могла основываться ответственность по гражданскому праву.

На чем основывается несение ответственности за неисполнение межгосударственного соглашения? Ответственность может возлагаться за неисполнение или за надлежащее исполнение содержащихся в соглашении обязательств. Из этого a contrario следует, что на основании какого бы то ни было, как бы ни именуемого такого документа, которым не определяются конкретно и однозначно обязательства сторон, ответственность не может возлагаться. Из этого следует также, что поскольку стороны выполняют внесённые в соглашение обязательства точно и исправно, но намеченный экономический итог все же не наступил, тоже не возникает ответственности. Это, квази, само собой подразумевающееся условие ответственности государства.

Возникает вопрос, положить ли в основание государственной ответственности убыток или ущерб, причиненный другой стороне с нарушением договора? В том случае, если в качестве санкции государственной ответственности нами принимается какая-либо форма возмещения убытков, очевидно, что условием для наступления государственной ответственности является также и то, чтобы нарушение договора причинило другой стороне ущерб. Между нарушением договора и ущербом должна наличествовать причинная связь.

Эти два последние условия ответственности (то есть причиненный другой стороне ущерб и причинная связь между нарушением договора и убытком) отпадают в том случае, если санкцией материальной ответственности является не возмещение убытков, а уплата денежной суммы в форме неустойки. Это лучше отвечает специфике экономических связей, огромному риску, большому объему стоимости. (К этому вопросу впоследствии я еще вернусь для более подробного рассмотрения).

Является ли инструментом государственной ответственности уплата квази-неустойки, взыскиваемой в случае нарушения договора, или же возмещение убытков, в любом случае негативным условием наступления ответственности — помимо перечисленных ранее условий — является то,

чтобы не наличествовала такая причина, которая правомочно может оправдать это нарушение договора нарушающим государством.

Следовательно, основанием государственной ответственности является факт нарушения договора, отсутствие оправдательных причин, а в случае ответственности по возмещению ущерба к этому присовокупляется также и ущерб, убыток, находящийся в причинной связи с нарушением договора.

С точки зрения государственной ответственности чрезвычайно существенно урегулирование вопроса, какие именно государственные органы могут от имени государства брать обязательства. По этому вопросу — в соответствии с венской конвенцией о договорных отношениях государств — целесообразно исходить из того принципа, что нормы и акты внутреннего права решают, какие органы государственной власти и государственного управления вправе брать обязательства от имени государства. В соответствии с этим сглашение должно считаться заключенным государством независимо от того, какой орган государства заключил его, при условии, что этот орган действовал в компетенции, установленной внутренним правом государства.

При таких обстоятельствах однако подлежит упорядочению, чтобы полагающееся на договор другое государство получало правовую защиту в таких случаях, когда договорозаключающий государственный орган преступил свою компетенцию, установленную внутренним правом. Это может быть обеспечено таким нормативным актом, который предусматривает, что государство, по общему правилу, не вправе ссылаться на то обстоятельство, что его собственные органы поступили в нарушение своей компетенции. Исключением из этого может быть только тот случай, когда нарушение компетенции явно имеет место и касается особо важной формы внутриотечественного права. Нарушение компетенции явным признается в том случае, если оно объективно само собой понятно для любого добронамеренно и в соответствии с общепринятой практикой действующего по данному вопросу государства.

III

При определении содержания государственной ответственности следует исходить из того, как происходит на практике выполнение межгосударственных договоров экономического характера. Наиболее частым методом реализации межгосударственных договоров является то, что изложенные в межгосударственных договорах экономические цели, взаимные права и обязательства конкретизируются хозяйственными организациями договаривающихся государств в гражданско-правовых контрактах. Межгосударственный договор реализуется выполнением гражданско-правового контракта между этими хозяйственными организациями. В меньшей части слу-

чаев бывает, что государство выполняет межгосударственный договор экономического характера не через свои хозяйственные организации, не на основе заключенных ими гражданско-правовых контактов, а непосредственно, путем деятельности собственных органов государственного управления. В подавляющем большинстве случаев это происходит тогда, когда соглашение заключено в смежной сфере, на стыке договора, имеющего экономический характер, и межгосударственных соглашений иного характера (например, создание совместных гидротехнических сооружений, такие совместные исследования, которые выполняются не хозрасчетными исследовательскими институтами, а находящимися на государственном бюджете и т. д.).

Рассматривая этот вопрос с точки зрения гражданско-правовых контрактов между хозяйственными организациями, видно, что в настоящее время подавляющая часть гражданско-правовых договоров между предприятиями служит реализации какого-либо межгосударственного соглашения. Даже если заключение договора между предприятиями и не базируется на какомлибо межгосударственном единичном соглашении с точно названной целью, то и в этом случае в основу заключаемых между предприятиями договоров кладутся, как правило, двухсторонние межгосударственные соглашения о товарообороте. Сегодня в практике стран-членов СЭВ еще довольно редко случается, чтобы к заключению договоров между предприятиями приводили прямые контакты между предприятиями без промежуточной организующей работы со стороны государственных органов. Интеграция благоприятствует широкому развертыванию непосредственных связей между предприятиями, расширение таких связей является важной частью Комплексной программы. Это однако, несомненно является длительным процессом. Лишь постепенно будут расширяться и умножаться такие договоры между предприятиями, которые основываются на реализации того или иного межгосударственного соглашения. Ныне, следовательно, гражданско-правовые договоры между хозяйственными организациями в большинстве случае заодно служат еще также и реализации межгосударственных соглашений Все это не означает того, что по реализации своих межгосударственных договоров у государства и нет иной задачи, чем то, чтобы своей хозяйственно-организационной деятельностью создавать гражданско-правовые договоры между предприятиями. В очень многих случаях (в областях, выходящих за рамки обычных внешнеторговых операций) государство своей деятельностью по управлению экономикой (путем народнохозяйственного планирования, аллокации инвестиционных средств, политики цен и финансовой политики или иными регулирующими средствами) должно создать те условия, на базе которых предприятия могут заключать договоры и выполнять свои договорные обязательства.

Из-за всего этого следует, что хотя объекты межгосударственного экономического договора и направленных на его реализацию гражданско-

правовых договоров между хозяйственными организациями в аспекте преследуемой ими экономической цели тождественны, но по содержанию обязательств не совпадают. Содержание межгосударственного соглашения, как правило, состоит не в прямом выполнении услуг во исполнение экономической цели, а в создании средствами хозяйственного управления тех экономических условий, на основе которых надлежащие хозяйственные организации государства могут заключать и выполнять гражданско-правовые договоры.

Государства, входящие в СЭВ, вследствие различий в их системах хозяйственного управления пользуются не одинаковыми средствами для принятия мер, необходимых для реализации договоров между предприятиями. В ряде государств-участников СЭВ для этого требуются плановые задания, другие страны-члены могут обеспечить выполнение своих межгосударственных соглашений иными средствами экономического регулирования.

Из всего сказанного следует, что содержание обязательств, изложенных в экономических межгосударственных соглашениях состоит в том, чтобы договаривающееся государство — в соответствии с собственным внутренним порядком — предприняло все те меры, которые нужны для того, чтобы его хозяйственные организации могли заключить гражданско-правовой договор, служащий реализации межгосударственного соглашения, и могли выполнить предусмотренные в этом гражданско-правовом договоре материальные услуги. К содержанию взятого государством обязательства относится также и то, чтобы воздерживаться от всех таких государственных мер, которые могут препятствовать его хозяйственным организациям в исполнении обязательств, взятых ими на себя в своих гражданско-правовых договорах. Из всего этого, однако, следует также и то, что государство ответственно только за выполнение собственных обязательств, но не несет ответственность за то, что выполнили ли его собственные хозяйственные организации свои гражданско-правовые договоры или же не выполнили.

Следовательно, в принятом порядке реализации межгосударственных договоров положение, как правило, таково, что ответственность государства и вовсе не возникает, так как вслед за межгосударственным соглашением заключаются договоры между хозяйственными организациями, обеспечивающие реализацию межгосударственного договора. Эти гражданско-правовые договоры, как правило, исполняются с большей или меньшей точностью, а неисполнение или же ненадлежащее исполнение договора является обычно не последствием действия или бездействия государственных органов. Таким образом вопрос ответственности за ненадлежащее исполнение договора получает регулирование в связях между предприятиями на основании Общих условий поставок и стоящего за ними гражданского права.

Проблематичным становится вопрос в том случае, если:

— органы государства непосредственно должны выполнять хозяйст-

венные обязательства, взятые в межгосударственном договоре, — следовательно вслед за межгосударственным договором не должны заключаться гражданско-правовые договоры, — и этот договор не выполняется, или

— если международный экономический межгосударственный договор должен быть реализован в порядке контактов между хозяйственными организациями, однако договоры между этими хозяйственными организациями не заключаются.

Из вышеизложенного уже вытекает, что применение материальной ответственности госуорства за нарушение заключаемых между государствами договоров экономического характера не станет повседневным фактором в хозяйственной практике. Материальная ответственность государства будет применяться гораздо реже, чем осуществляется предприятиями, состоящими друг с другом в торговых или иных хозяйственных связях, реализация взаимных претензий и требований, возникающих по поводу нарушения договора.

IV

Основополагающий вопрос разработки системы материальной ответственности государств состоит в том, чтобы определить, какими должны быть средства материальной ответственности, иными словами, какой должна быть система санкций по выполнению межгосударственных обязательств. В этом отношении в сущности напрашивается две возможности решения, а именно:

а) предписать обязательность возмещения убытков, размер которого может быть неограничен, однако может также и ограничиваться обусловленным процентом убытков или договорного объема. Можно себе представить двойное лимитирование, как по отношению к размеру, так и по отношению к объему договора;

б) лимитировать материальную ответственность установленной в конкретном межгосударственном договоре суммой квази-неустойки.

Рассмотрим эти две возможности ближе.

Обязательность возмещения убытков имеет свои достоинства. А именно:

а) этим решением реализуется лучше всего репарация. Потерпевший не претерпевает материального ущерба из-за того, что его партнер, находящийся по другую сторону международного договора, вследствие собственных экономических трудностей или по иным причинам не выполнил взятые им на себя в межгосударственном порядке обязательства;

б) большой материальный урон, воплощающийся в возмещении убытков, побуждает по-возможности избежать нарушение договора. Обязательность возмещения убытков стимулирует все государства к точному и своевременному выполнению своих международных обязательств, и если у него

возникает возможность выбора переносить или же проецировать свои определенные внутренние экономические затруднения и проблемы на сферу межгосударственных отношений, то при возможности такого выбора между попыткой решить возникшие трудности путем неисполнения межгосударственного договора, либо же отказаться от осуществления какой-либо внутренней цели развития, обязательность возмещения убытка несомненно стимулирует к тому, чтобы данное государство не перекладывало свои собственные затруднения на экономику других стран-членов СЭВ. Разумеется и в этом случае — более того из самого духа экономических связей между странами СЭВ, построенных на принципах пролетарского интернационализма, категорически следует, что государства — партнеры примут во внимание ход экономического развития данной страны и не потребуют исполнения межгосударственного договора в том случае, если это может привести в другой стране к тяжелым внутренним хозяйственным проблемам.

Однако обязательность возмещения убытков имеет также и весьма большие недостатки, а именно:

а) сопряженный с обязательностью возмещения убытков весьма большой экономический риск возможно может удержать от заключения договора. Нельзя забывать о том, что экономические межгосударственные договоры затрагивают весьма значительный объем, даже и в процентах национального дохода договаривающихся стран, и возникающий у другой страны убыток, возможно, многократно превзойдет объем договора. Вследствие этого возмещение убытков — в силу масштабов народного хозяйства — может представлять собой весьма значительную сумму и сравнительно с национальным доходом страны, с которой это возмещение взыскивается. В международных экономических связях — в договорах торгового характера, направленных на прямые услуги — возмещение убытков, по общему правилу, избегается, и вместо этого договоры предусматривают санкции в виде уплаты неустойки или материальной ответственности, лимитированной иным образом. Поэтому имеется такая опасность, что установление обязательности возмещения убытков, и в особенности установление обязательности возмещения убытков без ограничения, соразмерного с экономическим объемом договора, может удержать от заключения договора, и этим самым воспрепятствовать использованию той большой экономической организующей силы, которую означают межгосударственные договоры;

б) на большие затруднения наталкивается определение метода исчисления убытков.

При подсчете убытков приходится решать чрезвычайно трудные вопросы, дающие повод для множества правовых споров;

(например:

— метод пересчета расходов, возникших не в переводных рублях, а

в собственной национальной валюте или в свободно конвертируемой валюте, на переводные рубли,

— определение материально-правовой системы, применяемой при исчислении убытков, иными словами, какое понятие убытков нужно брать за основу при установлении размера возмещения и т. д.),

в) поскольку убытки возникают на территории одной из стран, может натолкнуться на чрезвычайно большие трудности для страны, причинившей эти убытки, приведение контрдоказательства против обоснования или предложенного потерпевшей страной доказательства относительно возникновения убытков и суммарного размера понесенных убытков;

г) все три трудности исчисления и применения возмещения убытка, которые могут привести к множеству правовых споров, еще усиливаются в связи с тем, что — как впоследствии к этому вопросу еще вернусь — в настоящее время не представляется возможным организовать форум, облаченный правом какого-либо арбитражного решения для разрешения связанных с этим спорных процессов.

Сумма квази-неустойки, установленная на случай нарушения договора, по отдельным конкретным международным договорам устраняет изложенные в предыдущем недочеты по возмещению убытков. Если стороны в отдельных конкретных договорах уславливаются, что в случае неисполнения или ненадлежащего исполнения договора, какая сумма уплачивается нарушающей стороной в пользу другого государства, то этим в значительной мере уже суммообразно лимитируется ответственность и устанавливаются пределы риска, с которыми государство должно считаться при заключении договора. Это гораздо лучше отвечает характеру экономических связей, чем обязательность возмещения убытков, и в особенности чем неограниченная ответственность по возмещению убытков. Этот метод, следовательно, устраняет тот важнейший недостаток принципа возмещения убытков, который состоит в том, что непредвидимый риск может удержать от заключения договора. Можно предположить, что государства только в том случае склонны заключать соглашения, гарантированные эффективными, действенными санкциями, если в целом могут считаться и предусматривать, к каким последствиям может привести возможное нарушение обязательств. Определенная сумма неустойки, уплачиваемая в случае нарушения договора, устраняет также и прочие уже упомянутые недостатки принципа возмещения убытков. При этом не нужно определять метод исчисления убытка, и таким образом ни по этому вопросу, ни в связи с конкретным подсчетом убытков не могут возникать споры. Отпадают также и трудности, сопряженные с доказательством и обоснованием убытков и проверкой этого доказательства.

Разумеется, соглашение об имущественной ответственности государств может носить только диспозитивный характер и стороны должны получать возможность уславливаться между собой в конкретном договоре либо о

неограниченном либо об ограниченном возмещении убытков или же даже об определенной сумме, уплачиваемой в случае нарушения договора. Немалозначителен, однако, факт, что содержит в себе в этом отношении межгосударственное соглашение о материальной ответственности государств в качестве основной нормы, ведь эти нормы, с одной стороны, носят инструктивный характер для договаривающихся сторон, с другой стороны, такие правила применяются в том случае, если конкретный договор о данном вопросе умалчивает.

Из всего этого следует, что, на мой взгляд, природе межгосударственных договоров экономического характера больше всего отвечает лимитирование ответственности. Наиболее целесообразным средством лимитированной, но не строго реализуемой ответственности по возмещению убытков является оговаривание определенной суммы (квази-неустойки), уплачиваемой в случае нарушения договора. Однако, как бы то ни было, возможность применения неограниченного возмещения убытков целесообразно ограничить, с тем, чтобы эта возможность реализовалась только при наличии особой договоренности между сторонами по этому вопросу, и сумму возмещения убытков — если такое возмещение и имеет место — ограничить определенным процентом от объема, охваченного договором.

V

Тесно к средствам материальной ответственности относится определение вопроса, чтобы:

а) имущественная ответственность сторон основывалась на виновности, и в этом случае надо высказать:

— подлежит ли виновность доказательству,

— или же вина презумпцируется;

б) ответственность была объективной.

Этот вопрос связан также и со средствами возмещения убытков, ведь наврядли вообразимо, чтобы ответственность по возмещению убытков — и в особенности неограниченная ответственность по возмещению убытков — строилась на объективной основе, тогда как определенная сумма, предусмотренная на случай нарушения договора, может без всяких особых затруднений иметь под собой объективную основу.

В то время как в литературе международного права общепризнан тот принцип, что государство несет ответственность за нарушение своих обязательств, известен целый ряд различных мнений, оспаривающих, необходима ли виновность государства для возникновения ответственности.

Классическая теория международного права, начиная с Hugo Grotius-a, принимает принцип виновностной ответственности; как правило,

этот принцип преобладает в литературе международного права и поныне. Сторонники объективной ответственности в меньшинстве. Существует и такая промежуточная точка зрения, что объективная ответственность ограничивается активными противоправными поведениями государства, а в случае бездействия необходимо наличие виновности.

Обоснование виновностной ответственности — хотя это по международному публичному праву и может иметь место — в случае государственной ответственности может привести к весьма большим трудностям. Прежде всего вследствие этого в центре споров о неисполнении договора или его ненадлежащем исполнении оказался бы вопрос, виновно или же невиновно суверенное государство. Это обстоятельство придает вопросу сильную политическую окраску, хотя в случае экономических договоров речь идет не об обязательствах первично-политического свойства, а об экономических обязательствах. Поэтому в любом случае нужно избегать такого положения, чтобы условием ответственности было то, чтобы потерпевшей стране приходилось доказывать виновность государства, которое причинило ему убытки. В случае обязательности возмещения виновности, и этим обязывать государство, нарушившее договор, к доказательству оправдательного характера.

Подведение ответственности под концепцию виновности или же построение ее на объективную основу в значительной степени связано с определением оправдательных причин, освобождающих от несения обязательств.

Обоснованная виновностью ответственность и объективная ответственность — исходя из обычно встречающихся оправдательных причин — отличаются друг от друга только в том, вменяется ли происшедший случай в вину причинителя ущерба или же потерпевшего.

Не существует комплексно разработанной системы ответственности без того, чтобы не определять систему причин, освобождающих от ответственности (экскульпативных поводов). При формировании материальной ответственности государства эта система тоже должна определяться. Такое определение в некоторых аспектах беспроблематично, имеется однако два таких вопроса, которые и в этой сфере нуждаются в более детальном рассмотрении.

Не требует особых доказательств, что непреодолимая сила, нарушение договора потерпевшим и согласие потерпевшего на нарушение договора исключают ответственность государства, причинившего убыток.

Детальнее следует изложить, может ли государство своими собственными односторонними актами освободить себя от ответственности, или же не может этого сделать. Государственные акты, как правило, воздействуют на договоры, заключенные хозяйственными организациями, таким образом, что законодательные акты или иные несопряженные с единичным конкретным делом государственные акты имеют освобождающий эффект, однако единичные акты, связанные с конкретным делом, не имеют такого воздей-

ствия. Однако в сфере вопросов государственной ответственности можно идти еще дальше, можно применять более строгое решения, чем это, ибо государство не может освобождать из-под ответственности самое себя, посредством собственного одностороннего акта.

VI

Я уже упоминал, что повседневный обычный механизм выполнения межгосударственных договоров таков, что на основе межгосударственного договора между хозяйственными организациями заключаются гражданско-правовые договоры, с которыми сопряжены санкции, установленные в договоре, в Общих условиях поставки и в стоящем за ними гражданском праве. Говорилось уже и о том, что обязательства государства, взятые им на себя в своих экономических договорах, по содержанию отличаются от содержания гражданско-правовых договоров, тождественных по преследуемой ими цели и служащих реализации государственных обязательств. Гражданско-правовые договоры направлены непосредственно на материальные услуги, а содержание государственных договоров направлено на осуществление тех государственных мер, которые создают возможность для заключения и выполнения гражданско-правового договора, а равно к удержанию от таких шагов и мер, которые препятствуют выполнению. Неисполнение или ненадлежащее исполнение гражданско-правовых договоров, заключенных между хозяйственными организациями, в экономическом отношении, однако, приводит к тому, что зафиксированные в межгосударственном договоре цели не претворяются в жизнь. Интересы полагающегося на договор государства находятся под угрозой, независимо от того, в итоге чего потерпели крушение экономические цели или что воспрепятствовало их достижению — то ли неисполнение межгосударственных обязательств или же неисполнение обязательств между хозяйственными органами.

Каково же взаимоотношение, взаимосвязь между двумя видами правовой ответственности?

Хотя сфера межгосударственных договоров и гражданско-правовых договоров между предприятиями сравнительно обособились друг от друга, между ними все же имеется тесная связь. Речь идет о двух ступенях единого экономического процесса, двух стадиях организации сотрудничества между двумя народными хозяйствами. Обязательство, взятое государством в межгосударственном договоре, не прекращается с заключением гражданско-правового договора, но соответственно преобразовывается по своему содержанию. Теперь государство должно заботиться — в соответствии со своим внутренним порядком — уже не о том, чтобы его хозяйственная организация заключила договор в соответствии с межгосударственными соглашениями, а должно заботиться о том, чтобы наличествовали те условия,

предпосылки, которые должны обеспечиваться государством для выполнения гражданско-правового договора. Если государство не выполняет этого своего обязательства и вследствие этого хозяйственная организация тоже становится нарушительницей договора, то реализация ответственности по отношению к стороне, не исполняющей свое обязательство, может произойти двумя способами:

а) неисполняющая обязательство хозяйственная организация в силу государственной меры (или отсутствия таковой) освобождается из-под ответственности на том основании, что исполнению обязательств помешала государственная мера, однако ответственность становится реализуемой по отношению к государству;

б) неисполняющая обязательство хозяйственная организация в силу государственной меры (или отсутствия таковой) не освобождается от ответственности, а несет ответственность перед хозяйственной организацией другого государства. Привлечение к ответственности происходит на уровне предприятия, и, таким образом, привлечение государства к ответственности отпадает, становится беспредметным.

Оба решения юридически приемлемы, хотя несомненно, что изложенное в пункте а) решение было бы теоретически более идеальным, элегантным. Учитывая, однако, что строительство и устрожение правовой ответственности должно содействовать экономическим процессам, которые служат ее основанию, решение в соответствии с пунктом б) является с практической точки зрения более целесообразным. Дело в том, что система ответственности между предприятиями является таким институтом права, который сложился за длительное время и имеет практический опыт, располагает разветвленной и организационно окрепшей системой форумов. В свою очередь, в области строительства государственной ответственности нами делаются только начальные шаги. Вплоть до тех пор, пока эта система ответственности не упрочится, не окрепнет, не станет общеприменимой на практике, было бы неверно ради принципиально более изящного решения заменить уже эффективно действующую систему ответственности новой, еще не окрепшей системой.

Не вызывает сомнений также и тот факт, что государство не может отвечать за нарушение гражданско-правовых договоров, заключенных между предприятиями, если они причинно не связаны с государственными мерами, актами или их отсутствием. Следовательно, государство, как правило, не отвечает за свои собственные хозяйственные организации.

Если неисполнение гражданско-правового договора происходит частично из-за неисполнения обязательств, взятых на себя государством, частично же вследствие упущений (бездействия) хозяйственной организации, то условия ответственности наличествуют на обоих уровнях. Поскольку, однако, экономическая цель по своему содержанию и в том и в другом случае одна и та же, то двукратное привлечение к ответственности — во избежание

нарушения non bis idem — не может иметь места. В таких случаях правильнее ограничивать ответственность по гражданскому праву, которая в уже лучше построенной практике функционирует лучше.

VII

Одним из ключевых вопросов построения системы ответственности является определение порядка и способов решения споров, возникающих в ходе применения ответственности. В процессе практической работы уже построена система решения споров экономического характера, возникающих между странами-членами СЭВ. Однако эта система служит не разрешению споров, а является системой согласования спорных вопросов. Двухсторонние консультации, проводимые на различных уровнях хозяйственного и политического руководства — если и не всегда за короткое время — приводят к разрешению спорных вопросов, как правило, путем взаимно выгодных компромиссов. Однако это еще не представляет собой юридически построенной системы форумов для решения споров.

Наиболее прочным в юридическом отношении построенным методом решения споров было бы создание странами-членами СЭВ международного арбитража, располагающего также и компетентностью для принятия решений. Этот арбитраж может быть создан в рамках международной конвенции об ответственности государств или же вне этой конвенции. Между международным арбитражем, имеющим право принятия решений, и теперешними, юридически неурегулированными консультационными методами, можно себе представить множество переходных, промежуточных вариантов. Вполне ясно, что межгосударственный арбитраж, располагающий правом принятия решений, не может быть создан с одного дня на другой словно «бог из машины». Создание такого арбитража в большей мере затруднило бы, чем облегчило бы построение стабильной системы государственной ответственности, поскольку означало бы создание новых институтов одновременно на двух фронтах и было бы скачком без опоры на практический опыт и в нарушение принципа последовательности.

Следует рассмотреть также и возможность переходных решений. Можно себе представить множество промежуточных вариантов, которые позднее, по прошествии длительного времени могут привести также и к созданию международного арбитража. Только для примера перечислю несколько возможностей: можно создать учреждаемую в соответствии с определенным порядком организацию для согласования проблем и можно установить для стран-участниц спора обязательство, чтобы в случае безрезультатности двухсторонних переговоров между ними, они продолжали согласовывание при содействии данной организации, деятельность которой имела бы характер услуги доброй воли. Впоследствии эту организацию можно было бы облечь

и таким правом, чтобы она разрабатывала рекомендацию для спорящих сторон для разрешения спорного вопроса, однако без того, чтобы это было постановлением, в обязательном порядке исполняемым сторонами. Такое согласовывание, а равно разработка рекомендаций в порядке услуги доброй воли, впоследствии, уже владея благоприятным опытом, может быть развита дальше, и может привести также и к образованию межгосударственного арбитража по экономическим вопросам.

Весьма целесообразным переходным решением в аспекте разрешения спорных вопросов может быть также и такой вариант, что за обязательства, взятые государством в экономическом договоре, гарантию берет на себя государственный банк. Система форумов для разрешения правовых споров между государственными банками уже сложилась. В случае гарантирования государственным банком, спор, сопряженный с материальными санкциями за нарушение межгосударственного договора, перемещается из плоскости государств в межбанковскую плоскость, и, таким образом, — на случай безрезультатности двухстороннего согласовывания — наличествовала бы сложившаяся система форумов для разрешения спорных вопросов.

VIII

Изложенные в предыдущем предложения содержат типовые решения, более-менее применимые для всех межгосударственных экономических договоров. Разумеется, это общее решение непригодно для того, чтобы могло применяться без изменений для любого межгосударственного экономического договора. Вполне естественно, что государства, заключающие конкретные экономические договоры, должны получать возможность для того, чтобы они строили систему ответственности в соответствии со спецификой данного договора. Следовательно, построение системы ответственности может произойти только в соглашении, имеющем диспозитивный характер, допускающем отступление дословно от всех его предписаний, причем такая возможность должна обеспечиваться в обязательном порядке.

Велико значение такого момента, как конструируется диспозитивность договора о построении системы государственной ответственности. Кардинальным, решающим вопросом здесь является решение, как поступать в том случае, если конкретное соглашение не содержит правила или нормы ответственности. Должно ли это обстоятельство иметь своим последствием неприменение государственной ответственности или же ответственность государства получит ход — с содержанием, предусмотренным относительно ответственности в общем межгосударственном соглашении? Вопрос, следовательно, заключается в том, допускается ли нами только отклонение от межгосударственного соглашения, устанавливающего ответственность государства категоричным распоряжением конкретного договора, или же вы-

раженная норма нужна для того, чтобы межгосударственное соглашение об ответственности применялось также и к конкретному правоотношению. В этом аспекте тоже представимо дифференцированное решение. Для таких соглашений, выполнение которых осуществляется на основе ряда независимых друг от друга договоров, заключенных хозяйственными организациями (долгосрочные и годичные торговые соглашения и т. д.), целесообразным представляется такое решение, чтобы категорически оговаривалось применение соглашения об ответственности. Такие соглашения же, которые реализуются одним, заключенным хозяйственными организациями, договором или несколькими, но друг с другом тесно взаимосвязанными договорами, более целесообразным делают такое решение, чтобы получали применение все те предписания соглашения о государственной ответственности, от которых в конкретном межгосударственном договоре категорически не отступились.

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Построение системы материальной ответственности государств может явиться эффективным вкладом для расширения со стороны права экономических связей между нашими странами, для осуществления интеграции. Это средство тоже может содействовать усилению важнейших движителей развития сотрудничества: взаимной заинтересованности, товарищеского сотрудничества, взаимной помощи на базе пролетарского интернационализма. Весьма большое значение имеет, чтобы мы следили за практическим применением и результатами формируемого регулирования — в особенности в первые годы — и на основе практики проверяли правильность примененных правовых решений, внося в случае надобности также и необходимые коррективы.

The Financial Liability of the CMEA-countries for economic obligations

by

Gy. Kálmán

The new-type co-operation relations in production, the inter-state agreements giving a legal form to these, the increase in their weight raises in a clear-cut manner States' liability for the performance of theire conomic obligations. States' financial liability is recognised both in international legal theory and the practice of international relations. States' financial liability is of an international legal nature but it has numerous traits which are characteristic of the sphere of international economic relations. This fact should be taken into account in framing the system of liability and sanctions.

The financial liability of States stems from a breach of contract, the absence of causes of exculpation and, if there is a case of liability for damages the damage in causal relationship with the breach of contract is added to the above.

Although the subject of an inter-state economic agreement and that of a civil law contract made in its implementation is identical as regards the economic purpose, the substance of the obligations is different. The subject of an inter-state agreement is

aimed usually not at a direct performance of an economic target but at making available, by means of economic guidance, of economic conditions on the ground of which the State's economic organizations concerned will be enabled to enter into and perform civil law contracts. The system of sanctions of States' financial liability may be a liability for damages or an amount of quasi-penalty stipulated for a a breach of contract.

The paper discusses in detail the benefits and drawbacks of the liability for damages; the latter are eliminated through the application of the quasi-penalty stipulated for a breach of contract.

Agreement on States' financial liability cannot be but of an optional nature and the parties should be given opportunity to stipulate in the contract unrestricted or restricted compensation or a fixed amount for a case of breach of contract. Liability should be based either on objective foundations or culpability should be presumed. If State liability and the economic organizations' liability are concurring it serves the purpose better, observing the principle of *ne bis in idem*, to give effect to the liability between economic organizations.

Disputes arising in connection with liability should be settled in the traditionally evolved procedure among CMEA-countries. Arbitration to take charge of settling disputes can be introduced only at a later stage but many variants are conceivable between reconciling views and settlement by arbitration which can be resorted to in grades.

Die materielle Verantwortlichkeit der RGW-Staaten für ihre wirtschaftliche Verpflichtungen

von

GY. KÁLMÁN

Da die neuartigen Kooperationsbeziehungen in der Produktion und die zwischenstaatlichen Vereinbarungen, die sie in rechtlicher Form verfassen, an Bedeutung stets zunehmen, wird die Frage der materiellen Verantwortlichkeit der Staaten für ihre wirtschaftliche Verpflichtungen immer schärfer aufgeworfen. Die materielle Verantwortlichkeit der Staaten wird sowohl in der Theorie des internationalen Rechts, wie in der Praxis der internationalen Beziehungen anerkannt. Die materielle Verantwortlichkeit der Staaten trägt einen internationalrechtlichen Charakter, hat aber zahlreiche Eigenschaften, die für die Sphäre der wirtschaftlichen Beziehungen kennzeichnend sind. Diese Tatsache muß bei der Konstruierung des Verantwortlichkeitssystems und der Sanktionen in Betracht genommen werden.

Der Grund der materiellen Verantwortlichkeit der Staaten ist die Tatsache der Vertragsverletzung, der Mangel an Exkulpationsursachen, und — falls es sich um eine Schadenersatzverantwortlichkeit handelt, wird noch der mit der Vertragsverletzung in kausalem Zusammenhang stehende Schaden eingerechnet.

Obwohl der Gegenstand des zwischenstaatlichen Abkommens von wirtschaftlichem Charakter und der auf seine Realisierung abzielenden, zwischen den Wirtschaftsorganisationen zustandekommenden zivilrechtlichen Verträge hinsichtlich des wirtschaftlichen Zwecks gleich sind — ist der Inhalt der Verpflichtungen verschieden. Der Inhalt des zwischenstaatlichen Vertrags ist gewöhnlich nicht die unmittelbare Erfüllung der auf wirtschaftliche Ziele gerichteten Leistungen, sondern mit Hilfe der Mittel der Wirtschaftsleitung die Schaffung jener Vorbedingungen aufgrund deren die entsprechenden Wirtschaftsorganisationen des Staates die zivilrechtlichen Verträge abschließen, und erfüllen können. Das Sanktionssystem der materiellen Verantwortlichkeit der Staaten kann entweder die Schadenersatzverantwortlichkeit oder aber eine für den Fall der Vertragsverletzung vereinbarte Summe von quasi-Konventionalstrafecharakter sein.

Die Abhandlung befaßt sich eingehend mit den Vorteilen und Nachteilen der Schadenersatzverantwortlichkeit; die Nachteile werden durch die, für den Fall der Vertragsverletzung vereinbarte Summe von quasi-Konventionalstrafecharakter eliminiert.

Das Abkommen über die materielle Verantwortlichkeit der Staaten kann nur dispositiv sein, den Parteien muß aber die Möglichkeit gegeben werden, sich im konkreten Vertrag entweder einen unbegrenzten, oder begrenzten Schadenersatz, schließlich sogar eine, für den Fall der Vertragsverletzung fällige bestimmte Summe vereinbaren. Entweder muß die Verantwortlichkeit auf objektiven Grund gestellt werden, oder die Vermutung

des Verschuldens aufgestellt werden. Im Falle einer Konkurrenz zwischen der Verantwortlichkeit der Staaten und der der Wirtschaftsorganisationen, scheint es zweckmäßiger zu sein, um das Prinzip *»ne bis in idem«* zu vermeiden, die Verantwortlichkeit zwischen den Wirtschaftsorganisationen zur Geltung kommen zu lassen.

Die durch die Anwendung der Verantwortlichkeit entstandenen Auseinandersetzungen müssen im Wege der zwischen den RGW-Mitgliedern sich schon ausgestalteten traditionellen Verfahren gelöst werden. Die Aufstellung einer die Auseinandersetzungen entscheidenden Arbitrage kann nur in einer späteren Periode verwirklicht werden, aber zwischen der Schlichtung der Fragen und der Entscheidung der Auseinandersetzungen im Wege der Arbitrage können sämtliche Variationen vorgestellt werden, die mit gewisser Stufenweisigkeit angewandt werden können.

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Problèmes de l'évolution du raisonnement en droit de procédure pénale. Les facteurs agissant sur les changements récents*

par

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La partie introductive de l'étude (I) esquisse les connexions existant entre l'évolution du raisonnement en droit de procédure pénale et la jurisprudence, et passe en revue les facteurs les plus importants agissant sur ce raisonnement, sur la pensée objective. Parmi ces facteurs, l'étude examine tout d'abord les conséquences qui se manifestent dans le droit de procédure à la suite des changements apportés au droit pénal de fond par l'évolution des sciences criminelles (criminologie, etc. (II)). Dans la suite, l'étude résume l'essence des changements liés aux conquêtes de la technique et des sciences naturelles et qui sont transmises par la criminalistique (III). Dans les parties qui suivent, l'étude analyse les questions liées au caractère socialement déterminé du droit (IV), ainsi qu'à l'essor des sciences traitant de la pensée, du raisonnement humains, telles la psychologie et la logique (V). Dans sa partie finale (VI), après avoir analysé les éléments du raisonnement en matière procédurale, l'étude passe en revue les facteurs de transmission qui jouent dans les changements intervenus dans le raisonnement du droit de procédure pénale (sources du droit positif, jurisprudence, principes directeurs de la politique en matière criminelle, application de la méthode comparative).

I. Le raisonnement en droit de procédure pénale et dans la pratique judiciaire. L'étendue et le nombre des phénomènes sont en liaison avec les comportements humains que les procès criminels ont à soupeser. Les méthodes et les procédés permettant leur mise à jour et leur établissement, et d'une façon générale, le développement des moyens et des institutions au service de la lutte contre la criminalité revêtent un caractère nécessaire dans le cadre du développement de la société, et évoluent en étroite corrélation avec cette dernière. Et c'est également d'une manière nécessaire que ces phénomènes entraînent

Notes

* Abbréviations utilisées pour revues:

ÁJ = Állam- és Jogtudomány (Sciences Politiques et Juridiques); ÁJI.Ért. = Az Állam- és Jogtudományi Intézet Értesítője (Bulletin de l'Institut des Sciences Juridiques et Politiques); BH = Bírósági Határozatok (Recueil des Décisions des Tribunaux); BVS = Бюллетень Верхового Суда СССР (Bulletin de la Cour Suprême de l'URSS); JK = Jogtudományi Közlöny (Bulletin des Sciences Juridiques); MFilSz = Magyar Filozófiai Szemle (Revue Philosophique Hongroise); MJ = Magyar Jog (Droit Hongrois); SGP = Советское государство и право (Etat et Droit Soviétiques); TSZ = Társadalmi Szemle (Revue Sociale)

certains changements dans la procédure pénale, tant du point de vue de son contenu que de sa structure. Dans l'analyse de ces changements, l'étude des tendances qui déterminent d'une manière générale le développement, l'évolution du raisonnement en matière de procédure, nous offre certains points d'appui utiles. Il est bien vrai que le poids, l'importance, le rôle de ces tendances varient eux-mêmes dans le cadre de la nouvelle étape de l'évolution de la procédure. Il n'en reste pas moins qu'à considérer d'une façon très générale: les facteurs qui déterminent ces tendances représentent dans cette phase du développement des éléments qui déterminent d'une manière similaire la théorie et la pratique du droit de procédure pénale des pays socialistes dans la phase actuelle de leur évolution.

Il ne fait pas de doute que les facteurs économiques, sociaux et politiques, au cours du développement de la société humaine influent l'évolution du raisonnement procédural, le développement de la pensée objective, que ce soit par la voie de la révolution, de la rupture totale avec le développement précédent, ou au cours d'un processus à caractère évolutif. Ils exercent une influence certaine sur le déroulement, voire l'efficience même de la procédure pénale, à travers certains éléments intermédiaires, souvent d'une extrême complexité. Aucun des participants au procès criminel ne peut se soustraire à l'action de ces facteurs, à l'influence du milieu social. Il en est ainsi tout particulièrement du procureur et du juge, qui vivent eux-mêmes dans les cadres de la société. Ils exercent leur fonction au nom de l'Etat et de la société dont ils défendent l'ordre établi. Mais il en est de même de l'accusé qui est obligé de subir le poids de la réprobation de l'Etat et de la société sous la forme du procès.

Il est certain que les facteurs qui influencent le développement du droit de procédure n'agissent pas toujours, je dirai même, n'agissent pas en général directement sur la décision prise dans les affaires concrètes par l'entremise de la législation ou la politique pénale des organes de la justice. Mais même sous ce rapport, du fait de l'action des facteurs déterminant le développement social sur les décisions d'espèce, il existe une connexion mutuelle entre les décisions d'espèce et la politique poursuivie dans le domaine de la justice. Nous devons entendre par cette dernière aussi bien la politique poursuivie dans l'application du droit que la direction de principe la politique législative, par la voie de nouveaux maillons intermédiaires qu'il nous est impossible d'analyser ici. En effet, les indications en provenance de la pratique concrète, aussi bien que celles issues de l'analyse des solutions recherchées ou déjà trouvées, ainsi que de leur généralisation devenue nécessaire le cas échéant, constituent des sources d'information très importantes et efficientes (si elles sont acheminées par des facteurs intermédiaires appropriés), pour les organismes chargés de diriger la politique pénale, tant sur le plan de la législation que de l'application des lois. A travers tous ces éléments, nous voyons se réaliser le programme de l'orientation scientifique de la vie sociale, dans un domaine peut-être restreint à

l'échelle de la société, mais qui n'en est pas moins important du fait de l'importance pour la société de la lutte contre la criminalité.

Le développement du droit de procédure, qui reflète l'évolution économique, sociale et politique, confirme en tous points, tant pour ce qui est du champ des circonstances à découvrir et à constater dans le procès criminel, que pour ce qui est des instruments de la connaissance, la thèse de *Hegel* selon laquelle la « pratique » *de la pensée devance en général le développement de la « théorie » de la pensée.*[1] Lorsque nous parlons ici du raisonnement, il ne s'agit pas du raisonnement de l'individu, mais de *la pensée*, du résultat de l'activité cognitive de la société en tant que totalité, du résultat du processus sociohistorique du reflet de la réalité. Le raisonnement en matière de procédure qui nous intéresse ici représente non plus le raisonnement des individus pris un à un, mais bien « la pensée de nombreux milliards d'individus humains du passé, du présent et à venir ».[2] Les facteurs qui agissent d'une façon générale sur le raisonnement procédural sont également importants du point de vue de l'analyse du contenu du raisonnement poursuivi dans les décisions d'espèce, dans les cas concrets, et qui façonne le résultat de la procédure pénale. En effet, dans la réalisation de la tâche fondamentale de la procédure criminelle, dans l'établissement de la vérité objective, le niveau et le contenu de nos connaissances font que nous raisonnons différemment. La perception même des données se trouve modifiée: nos connaissances se reflètent dans la manière dont nous percevons la réalité.[3]

Les facteurs qui influencent le développement du raisonnement du droit de procédure agissent différemment dans les diverses phases de la procédure pénale et de plus leur action est extrêmement complexe. Leur poids, la mesure de leur importance diffèrent selon les phases de la procédure. Nous tenterons ci-dessous de faciliter leur analyse en étudiant avant tout les facteurs médiatisés par les diverses sciences criminelles et se rattachant directement au droit pénal de fond. Nous analyserons ensuite les possibilités de l'utilisation des connaissances scientifiques et pratiques des sciences techniques et celles de la nature en liaison avec le développement du raisonnement procédural. Nous étudierons enfin l'effet exercé sur l'évolution du raisonnement en matière de procédure par les recherches effectuées dans les divers domaines des sciences sociales, ainsi que par les résultats obtenus par les sciences traitant des processus de la pensée.[4]

[1] RUBINSTEIN: *Les fondements de la psychologie générale* (Trad. hongroise) tome 2. Budapest, Akadémiai Kiadó, 1967. p. 577. L'auteur expose d'une façon très intéressante l'apparition de la pensée théorique, abstraite, à partir de la pensée pratique.

[2] ENGELS: *Antidühring.* (Trad. hongroise) Budapest, Szikra. 1948. p. 82.

[3] RUBINSTEIN: op. cit. p. 574.

[4] Cette distinction n'est pas exacte, et ne peut naturellement pas l'être. Les tendances exposées interagissent également, et les possibilités d'actions réciproques multiples sont souvent importantes. Ainsi p.ex. certains des résultats du domaine des sciences naturelles que nous traitons ici à part, comme p. ex. les connaissances relatives à l'un

II. Le développement des sciences criminelles et du droit pénal de fond. La conception générale sur laquelle se fonde le raisonnement du droit de procédure socialiste est nécessairement et sans équivoque aucune le matérialisme dialectique. Aussi sommes-nous partis dans la suite de nos recherches de cette thèse fondamentale qui stipule: est matérialiste celui qui reconnaît l'existence des nécessités naturelles et qui en déduit le caractère nécessaire de la pensée. Celui qui déduit la nécessité, la cause, les lois etc. de la pensée elle-même est, par contre, un idéaliste.[5]

Notre point de départ dans l'étude de l'évolution du facteur qui détermine pour une part majeure le développement du raisonnement en droit de procédure est le droit pénal de fond.[6] La criminalité constitue dans les conditions du socialisme également un phénomène de masse déterminé par les conditions sociales. Notons en passant, d'une manière générale, que toute une série de facteurs placent sans relâche le droit de procédure devant des problèmes et des méthodes toujours nouveaux, en particulier sur le plan de la preuve et du jugement. Il en est ainsi des problèmes les plus généraux en liaison avec le caractère essentiellement social du droit pénal lui-même, avec la notion de la criminalité etc. Signalons parmi ces facteurs l'évolution de la dogmatique pénale, ainsi l'apparition de nouvelles conceptions touchant la notion de délit ou de crime, l'élaboration de solutions nouvelles touchant le concept des actes socialement dangereux, des éléments constitutifs de l'infraction, du caractère illégal du comportement etc. pénalisant essentiellement des comportements contraires aux règles de la direction économique et aux normes morales. Notons enfin de ce point de vue l'effet exercé par le nouveau système pénal fondé sur la recherche des causes de la criminalité. Les causes de la criminalité individuelle sont en partie déterminées par les conditions sociales. C'est en liaison avec ce

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des facteurs criminogènes, agissent entre autres directement sur le raisonnement du droit pénal matériel, et plus généralement, sur le raisonnement criminologique, et de nos jours, l'étude des activités psychiques serait impensable sans faire entrer en ligne de compte les facteurs biologiques, sociaux, etc. C'est pourtant cette possibilité de délimitation que nous avons adoptée ici de prime abord, car elle donne un aperçu utile d'ensemble, malgré le danger de certaines répétitions.

[5] LÉNINE: *Matérialisme et empiriocriticisme.* (Trad. hongroise) Œuvres, tome 14. Budapest, Szikra, 1953. pp. 157—168. Le recueil intitulé: *Le Raisonnement juridique* (Actes du Congrès mondial de philosophie du droit. Publ. par J. HUBIEN. Bruxelles, Bruylant, 1971) publie plusieurs études groupées autour de quelques sujets particuliers, et qui sont centrées avant tout sur l'histoire du raisonnement juridique dans les systèmes juridiques des sociétés capitalistes, non-socialistes (voir pp. 185—219).

[6] Pour les questions générales du développement du raisonnement en droit pénal matériel, voir dans la littérature spécialisée hongroise HORVÁTH, T.: *A marxista—leninista büntetőjogtudomány tárgya és módszertanának alapvonásai* (Objet de la science marxiste—léniniste du droit pénal, et traits fondamentaux de sa méthode). ÁJI. Értesítő, 1961. pp. 451—497, et FÖLDVÁRI, J.: *A büntetőjogi gondolkodás alakulása* (La formation du raisonnement dans le procès pénal). JK. 1965. pp. 185—193. La conférence internationale de la table-ronde organisée par le groupe national hongrois de l'AIDP (Les recherches en sciences naturelles et le droit pénal. 6—7 octobre 1971.) n'a pas traité de question intéressant le droit de procédure.

fait que nous voyons l'approche criminologique[7] agir de plus en plus énergiquement dans la lutte pratique contre la criminalité. Cette approche (que nous considérons ici dans son sens le plus large, quitte à en tracer par la suite les limites) se fonde sur la compréhension et la mise au jour des facteurs qui déterminent la personnalité de l'auteur de l'infraction, de l'inculpé. Une des conséquences de cette conception est que de nos jours déjà le nombre des faits qualifiés comme *relevants de l'affaire* et qui doivent être étudiés dans le cadre de la procédure et soumis au jugement pénal, s'est singulièrement élargi. La sphère des faits relevants de l'affaire dépasse donc de beaucoup le champ des éléments de fait concret répondant aux éléments constitutifs généraux et particuliers de l'infraction, que l'école de droit pénal classique consent seuls à prendre en considération, estimant, à partir de sa conception purement dogmatique, centrée sur le droit, que l'infraction n'est rien d'autre qu'un acte portant atteinte aux normes juridiques.[8] Nous pouvons parler en conséquence, à l'heure actuelle, d'une notion étroite des faits relevants de l'affaire, confinée aux éléments de fait correspondant aux éléments constitutifs des infractions, déterminés par la loi et d'une notion plus large, comprenant toutes les autres circonstances intéressant la qualification, l'imputabilité, la culpabilité et le montant de la peine. Cette conception nouvelle est étroitement liée d'une part aux idées humanitaires, centrées sur l'homme, qui pénètrent la procédure socialiste, d'autre part à l'intention d'assurer une efficience accrue à la procédure pénale. Cette conception cherche à assurer et à garantir au cours de la procédure pénale le respect des droits de l'Homme à l'égard également des personnes soumises à la procédure pénale.[9] Elle cherche, selon son deuxième élément, à définir en même temps les moyens permettant aux autorités compétentes de recon-

[7] Dans ce qui suit, je comprend sous ce concept la conception fondamentale orientée sur l'application pratique de la recherche traitant des causes de la criminalité (y compris les effets, les interconnexions également des facteurs criminogènes de caractère biologique, psychique, physique, sociologique, et d'une manière générale, d'origine sociale etc.), ainsi que de la lutte contre la criminalité, en y ajoutant également les efforts et les méthodes destinés à mettre en œuvre cette conception. En effet, parmi les critères conceptuels de la criminologie (Cf. p. ex. VERMES, M.: *A kriminológia alapkérdései* (Questions fondamentales de la criminologie). Budapest, Akadémiai Kiadó, 1971. p. 138., ce sont ces facteurs qui sont en rapport direct avec les circonstances à découvrir dans les affaires criminelles d'espèce et à apprécier dans le jugement.

[8] Ainsi p. ex., en Hongrie, le nouveau Code de procédure pénale entré en vigueur au 1er janvier 1974 (Loi I de 1973, dans la suite: C.pr.p.) déclare dans son article 59 que la preuve s'étend à tous les faits importants du point de vue de l'application des lois pénales et des règles de procédure. Les considérants de la loi indiquent qu'il est nécessaire de prouver — dans la mesure nécessaire à la constatation de la responsabilité pénale — — les faits qui caractérisent la personne de l'inculpé et le danger social représenté par lui. C'est à peu près de la même manière que le C. pr. p. de la RSFSR (Art. 68, point 3) et le C. pr. p. allemand (dans son Art. 8) définissent les circonstances à constater concernant la personne de l'accusé. Le C. pr. p. roumain (Art. 3) et polonais (Chap. 8, Art, 1) ne prescrivent que l'établissement des données relatives à la personnalité de l'accusé.

[9] C'est se but que souligne l'Art. 4 du C. pr. p. sur la garantie des droits du citoyen. Voir à ce propos, pour l'Europe occidentale: KÜHNE, H. H.: *Strafprozessuale Beweisverbote und Art. 1 I. Grundgesetz.* Köln—Bonn etc. C. Heymanns Verl. 1970. p. 144.

naître les personnes commettant une infraction, et de les faire passer en justice le plus rapidement possible, en ne recourant à la limitation des libertés humaines que dans la mesure du strict nécessaire. Ce sont ces mêmes points de vue qui président aux recherches scientifiques sur les questions de procédure visant à élaborer dans le détail les principes de la procédure pénale et à fonder en théorie les solutions assurant d'une part l'efficacité de la procédure pénale, et d'autre part la garantie des libertés humaines pour les personnes soumises à la procédure pénale.[10]

Ainsi les résultats et les tâches nouvelles en liaison avec l'analyse scientifique détaillée, entreprise à partir d'aspects nouveaux du phénomène de la criminalité, de ses causes et des possibilités de la combattre. Ces tâches ont donc élargi le champ des faits relevants de l'affaire et qui sont à prendre en considération dans le cours de l'établissement des faits, pour la constatation de la culpabilité et l'efficience du montant de la peine. A cela s'ajoute encore l'apparition d'une conception nouvelle. Cette conception au lieu de considérer le délit ou le crime d'une manière unilatérale et statique, entend partir au contraire de la complexité de leur caractère et de leur dynamisme, et estime en conséquence nécessaire de considérer l'acte incriminé dans sa complexité, dans sa genèse et son développement. Les tâches nouvelles de la procédure pénale en matière de prévention constituent aussi un impératif récent sur lequel nous reviendrons encore.

On doit tenir compte du fait que « les sciences sociales sont appelées d'une part à reconnaître à modifier la réalité, et que d'autre part elles possèdent une fonction idéologique bien déterminée; que les travaux de recherche visant à étudier la réalité n'affaiblissent pas, mais au contraire, renforcent le rôle idéologique des sciences sociales, que ces deux aspects sont inséparables l'un de l'autre, et constituent une unité étroite ».[11] Il convient donc de souligner l'importance particulière de certaines recherches. Nous pensons ici avant tout aux travaux de recherche concrets, visant à étudier et à mesurer les causes de la criminalité, les facteurs fondamentaux (biologiques, génétiques, et, d'une façon générale, médicaux, psychiatriques etc.) de la formation de la responsabilité pénale, les facteurs sociologiques de la criminalité, et en particulier les

[10] Voir à ce propos dans la littérature des pays socialistes: *Демократические основы советского социалистического правосудия* (Les bases démocratiques de la juridiction socialiste soviétique). Sous la réd. de M. S. Strogovitch. Moscou, Ed. Naouka, 1965. pp. 81—149. Dans la littérature plus récente, certaines questions sont étudiées dans: *Теория доказательств в советском уголовном процессе* (La théorie des preuves dans le procès pénal soviétique). Moscou, Издат. «Юридическая литература, 1968. tome 1, 1966, ainsi que par Добровольская, Т. N.: *Принципы советского уголовного процесса* Москва, Издат. «Юридическая литература», 1971. p. 197. Dans la littérature hongroise, voir: Mme Szabó—Nagy, T.: *A büntető eljárási rendszer alapjai* (Les bases du système de la procédure pénale). Budapest, Közgazdasági és Jogi Kiadó, 1966. p. 293.

[11] *Az MSZMP tudománypolitikai irányelvei* (Directives de la politique scientifique du PSOH). Budapest, Ed. Kossuth, 1969. p. 55.

éléments criminogènes.[12] Sont également très importantes l'analyse des données relatives à la pratique concrète des tribunaux et les recherches, qui sont susceptibles de fournir certains éléments supplémentaires à la direction de principe bien fondée et efficace de la lutte contre la criminalité. En résultat de ces recherches, dont nous avons fait mention, nous constatons que les questions touchant les causes criminogènes, celles liées aux circonstances et aux possibilités de sa réalisation, à la presonnalité de l'auteur de l'infraction, de l'inculpé en procès, et aussi a son sort futur qui l'attend après l'accomplissement de la peine, occupent une place de plus en plus importante à l'intérieur même du raisonnement procédural.

La transformation de la structure même de la criminalité, résultant de l'évolution de la société et de la technique, constitue un facteur supplémentaire influançant le raisonnement en droit pénal de fond. En effet, du fait de ce développement, nous rencontrons en un nombre croissant des infractions nécessitant, de par leur complexité, de leurs dimensions, ou en fin de compte, de l'interconnexion des questions techniques soumises à l'appréciation du tribunal, la mise en œuvre de méthodes d'investigation, de preuve et de jugement particulières, exigeant le recours à des spécialistes de plus en plus nombreux.[13] Tout cela se répercute nécessairement sur le raisonnement procédural également, et exige donc un développement corrélatif des règles de la procédure et leur adaptation aux nouveaux besoins.

Du fait des facteurs influençant le développement du droit pénal matériel, on peut distinguer dans les pays socialistes deux tendances fondamentales dans l'évolution du raisonnement procédural, tendances déterminées en fin de compte par la logique objective de l'évolution de la société. La première de ces tendances particulières, c'est que le raisonnement en matière de procédure (qui, notons le, comme en général le raisonnement juridique pris dans son ensemble, représente un élément, une partie du raisonnement pratique[14] est en train de

[12] Parmi ces facteurs, pour les facteurs biologiques p.ex. voir dans la littérature hongroise intéressant le droit pénal matérial LOSONCZY, I.: *L'influence du progrès de la biologie et de la médecine sur le droit pénal* = Droit hongrois — droit comparé. Budapest, 1970. pp. 293—311., HORVÁTH, T.—VISKI, L.: *A biológia és az orvostudományok fejlődésének hatása a büntetőjogra* (L'influence de la biologie et des sciences médicales sur le droit pénal). ÁJ. 1969. pp. 622—653. Pour les éléments génétiques nécessaires à l'appréciation du droit pénal, voir p. ex. dans la littérature étrangère MENDELEWICZ, J.—WILMOTTE, J.—FLAMENT, J.—STOQUART, R.: *Les déterminants génétiques de la délinquance. Problèmes de l'anomalie. XXV.* Revue de Droit Pénal et de Criminologie, Bruxelles, 5/1970. pp. 439—451, qui donne la bibliographie (occidentale) détaillée de la question. Nous reviendrons encore plus loin (IV) aux facteurs criminogènes que l'on peut interpréter comme des phénomènes sociologiques.

[13] Il en est ainsi p. ex. des délits intellectuels et autres, commis au préjudice de la propriété sociale, ou mettant celle-ci en danger, et qui apparaissent souvent sous des formes organisées; de certains délits en liaison avec le développement industriel et technique, avec la modification de la structure de la production, comme par exemple les délits écomiques, les différentes espèces de délits mettant en danger les personnes et les biens, les délits liés aux transports, etc.

[14] Voir à propos de ce phénomène NEWELL, J.: *Legal reasoning as a type of practical reasoning.* = Raisonnement juridique. pp. 545—550.

passer de la conception statique de l'infraction à sa conception cynétique ou dynamique. A la place de l'approche purement formelle, fondée sur les caractéristiques de l'infraction telles qu'elles sont décrites par la loi, et qui est de ce fait unilatérale, la procédure elle-même évolue elle aussi dans le sens de la compréhension et de la reconnaissance du fait que les infractions constituent un phénomène social extrêmement complexe, à l'élaboration duquel de très nombreux facteurs participent, et qui demandent par conséquent à être examiné dans leur dynamique.

La conséquence nécessaire de cette situation se reflète dans une deuxième tendance fondamentale: dans la procédure des pays socialistes, les tâches de la procédure pénale vont en s'élargissant. Le développement récent du droit de procédure pénale indique en effet que le champ de l'action acceptée et accomplie par la société et l'Etat dans la lutte contre la criminalité est de plus en plus important. Il va en s'élargissant et gagne en fermeté. Ce fait, les nouveaux codes de procédure socialistes l'expriment souvent de façon expresse, positive. Les tâches qui se présentent ici indiquent en général une double orientation: il s'agit d'une part de poursuivre les auteurs des infractions et de définir les conséquences juridiques à leur appliquer. C'est la tâche concrète de la lutte contre la criminalité. Il s'agit d'autre part, en tant que tâche partielle entrant dans le cadre général de la lutte contre la criminalité, de pourvoir aux tâches définies sur le plan de la prévention de la criminalité considérée comme un phénomène social. De ce fait, les tâches de la procédure pénale s'étendent de plus en plus au-delà de la découverte des actes concrets et de la poursuite des délinquents. Elles ont également trait, dans le cadre général de la lutte contre la criminalité et sur la base des facteurs criminogènes saisis au niveau des cas individuels, *à la suppression des causes de la criminalité*, et par voie de conséquence, à la prévention des infractions.[15] Il faut en même temps mentionner les résultats de la *victimologie*, qui donnent sur un plan international aussi des recommandations très utiles pour les problèmes en liaison aves le rétablissement de l'équilibre juridique et social truoblé par l'infraction.[15a]

III. Les possibilités de l'application des connaissances techniques et des résultats des sciences naturelles. A côté des tendances apparaissant dans le droit pénal matériel et agissant directement sur le droit de procédure également à la suite des résultats obtenus par certaines sciences criminelles, et en particu-

[15] Voir la même disposition dans le C. pr. p. tchécoslovaque (Art. 1, al. 1), polonais (Art. 2, al. 1, point 3), allemand (Art. 1., al. 2, et Art. 2, al. 2). (RSFSR (Art. 2, al. 2) et roumain (Art. 1, al. 2). Dans la littérature hongroise voir pour cette question BARNA, P.: *A bűnüldözés elvi kérdései* (Problèmes fondamentaux de la lutte contre la criminalité). Budapest, Közgazd. Kiadó, 1971. p. 514. Nous trouvons quelques points de vue nouveaux chez RUTSCH, H.—KAISER, H. *Zur Entwicklung der komplexen Kriminalitätsvorbeugung und Bekämpfung.* Neue Justiz, 1971. p. 314—319.

[15a] Voir p. ex· les problèmes de «L'indemnisation des victimes de l'infraction pénale» (3e question au XIe Congrès International de Droit Pénal, Budapest, 1974.), dont le matériel est publié dans les Nos 1—2. 1973 de la RIDP.

lier par la criminologie, d'autres recherches jouent également un rôle très important. Nous pensons avant tout aux résultats réalisés par certaines des sciences explorant le domaine de la criminalité (sciences auxiliaires du droit de procédure pénale). Ces résultats sont en liaison avec la découverte des actes criminels et avec l'administration de la preuve, aussi bien qu'avec l'adéquation et l'efficience de la peine infligée, résultats qui sont susceptibles d'être utilisés et appliqués dans la pratique de la procédure pénale. Dès maintenant, l'utilisation et l'application de ces résultats influe dans certains domaines sur le raisonnement procédural par l'entremise de la législation et de la réglementation positive. Un trait extrêmement caractéristique de ces changements est qu'ils représentent la pénétration nécessaire du raisonnement propre aux sciences naturelles dans la juridiction pénale, aussi bien au cours de la phase de recherche des infractions que de leur preuve et de leur appréciation.[16] L'apparition de la criminalistique, de cette science relativement nouvelle, qui évolue en étroite liaison avec les progrès généraux de la science, indique clairement l'importance de ce phénomène. La mise au jour, la constatation et l'appréciation des phénomènes importants du point de vue pénal exigent l'application simple ou combinée de procédés de connaissance et de preuve sans cesse renouvelés, en grande partie particuliers aux sciences naturelles (techniques, biologiques, médicales, chimiques, ballistiques, tracéologiques etc.). La caractéristique la plus générale de ces méthodes, (si nous ne considérons pas en cet instant encore les problèmes des faits psychiques dont nous parlerons plus loin) des faits probants liés d'une façon générale aux processus de conscience internes, c'est qu'ils utilisent des éléments de preuve à caractère objectif. Ces éléments de preuve ne dépendent donc pas de facteurs subjectivement déterminés, ne dépendent pas des personnes (que ce soit l'inculpé, la victime ou le témoin etc.) Une autre spécificité de ces éléments de preuve est, qu'ils sont souvent susceptibles d'être mesurés, d'être appréciés et contrôlés selon des critères objectifs, sur la base des méthodes appliquées par les diverses disciplines spécialisées. De ce fait, l'adéquation de la connaissance devient contrôlable par la pratique.[17] Notons ici que par pra-

[16] A propos de cette question, nous trouvons certaines indications relatives à des aspects intéressant le droit de procédure dans STEPHANITZ, D.: *Exakte Wissenschaften und Recht. Einfluß von Naturwissenschaften und Mathematik auf Rechtsdenken.* Berlin, De Gruyter, 1970. p. 273.

[17] Строгович: Курс советского уголовного процесса (Manuel de procédure pénale soviétique). Moscou, Ed. Naouka, tome I, 1968. pp. 81—82, expose certains points de vue généraux en connexion avec la nécessité de l'application du raisonnement propre aux sciences naturelles dans la procédure pénale. L'auteur analyse par ailleurs les tâches à long terme intéressant le développement des sciences sociales, telles qu'elles ont été définies par le Comité Central du PCUS. La question est traitée en détail dans la littérature hongroise, sous ses aspects aussi bien théoriques que pratiques par la monographie de KERTÉSZ, I.: *A tárgyi bizonyítékok elmélete a büntetőeljárási jog és a kriminalisztika tudományában* (La théorie des preuves matérielles dans la science du droit de procédure pénale et la criminalistique). Budapest, Közgazd. és Jogi Kiadó, 1972. 461 p. Pour ma position concernant la pratique en tant que critère du contrôle de la connaissance, voir plus en détail dans ma monographie *Tanúbizonyítás a büntetőperben* (Le témoignage dans le

tique, considérée en tant qu'activité matérielle, il faut comprendre d'une façon générale toute l'activité de l'homme. L'essence de l'activité humaine est justement l'effet matériel que l'homme exerce sur le monde. Sous ce rapport donc le processus du développement et l'histoire de la pensée objective se fonde sur le développement de la pratique,[18] car en fin de compte, tout raisonnement, quel qu'il soit, est en relation avec la pratique.

Le raisonnement propre aux sciences naturelles, et, en liaison avec celui-ci, le raisonnement pratique, influent sur le raisonnement du droit de procédure en y entraînant certaines modifications de structure. Mais cette action va plus loin encore. Elle influence nécessairement l'ensemble du processus de raisonnement — un processus qui se compose autant d'un raisonnement réproductif, que d'une activité de raisonnement ayant pout but la solution des problèmes — raisonnement qui élabore directement les décisions en matière pénale. Les modifications intervenues dans la structure de la procédure nous montrent l'accroissement de l'importance de l'instruction préparatoire (en liaison tout particulièrement avec la fixation de certaines preuves, avec l'expertise, les possibilités de la confection de modèles, de l'échantillonnage, de l'expérimentation etc.), et en conséquence certains principes fondamentaux de la procédure sont appliqués avec plus de rigueur, comme celui de l'audition des parties, la publicité devant les partis au procès, le principe de la défense.[19] L'importance pour le processus de raisonnement de l'application des méthodes de connaissance propres aux sciences naturelles va encore plus loin. Elle met notamment à la disposition des autorités judiciaires, sur la base de connaissances soumises au contrôle de la pratique, un grand nombre et toujours plus vaste de données à caractère objectif, liées à la constatation et à l'appréciation de phénomènes passés. De ce fait, nous constatons la réduction de l'importance des éléments intuitifs, qui ont joué pendant très longtemps un rôle presque exclusif, mais aujourd'hui en voie de régression, dans la découverte de l'infraction, dans la preuve et l'appréciation des faits. Nous voyons ainsi l'élément empirique et rationnel revêtir une importance de plus en plus grande dans l'instruction, la connaissance et l'appréciation. C'est justement en cela que se trouve le progrès qui se fait également jour dans l'évolution du droit de procédure pénale.[20]

procès pénal). Budapest, Közgazd. Kiadó, 1966. pp. 472 et suiv. Pour l'évolution du raisonnement, voir KÁROLY, É.: *A kriminalisztikai gondolkodás* (Le raisonnement dans la criminalistique). Belügyi Szemle, 5/1968. pp. 28—37.

[18] RUBINSTEIN: ibidem p. 577.

[19] Pour la littérature concernant les garanties qui se présentent ici, voir notes Nos. 9 et 10. Pour les tâches modifiées de la pratique du jugement à l'ouest, modifications intervenues du fait du développement scientifique et technique, voir MARX, YVONNE: *Die Entwicklung der Aufgaben des Richters im Strafprozeß*. Zeitschrift f. d. ges. Strafrechtswissenschaft, 1969. pp. 1010 et suiv.

[20] L'importance de l'utilisation des connaissances techniques et scientifiques dans le procès criminel se manifeste de la façon le plus claire dans la réglementation par le droit positif des cas où l'expertise est obligatoire. Quelquefois la loi elle-même contient des dispositions de ce genre qui ne touchent pas au principe de la liberté de la preuve et de la

De plus, l'utilisation des résultats de ce type des sciences techniques et naturelles donne naissance à des procédés particuliers de la connaissance, ce qui, à son tour, entraîne nécessairement l'élaboration de nouvelles solutions en droit de procédure. Le fondement de ces solutions nous le trouvons dans un élément de base essentiel des méthodes de connaissance et de preuve particuliers, transmises par les sciences techniques et naturelles ou empruntées à elles. Nous pensons sous ce rapport, non pas aux méthodes propres à reconnaître les facteurs criminogènes, mais plutôt à celles en liaison avec la preuve des comportements et des attitudes relevants dans le procès pénal, à des faits à prendre en considération par les autorités judiciaires. Le fondement de cette pensée est, que si nous arrivons à prouver l'exactitude de nos concepts concernant tel ou tel phénomène naturel, nous sommes capables de provoquer nous-même ce phénomène à partir de ces conditions.[21] C'est cette manière de voir qui a fondé dans la procédure pénale la possibilité de l'utilisation de modèles matériels, ainsi que de la reproduction expérimentale de certains éléments importants, en particulier au cours de l'expertise, mais aussi en liaison avec d'autres éléments de la procédure (preuve par expérience, échantillonnage,[22] confection de modèles, etc.). Toutes ces circonstances demandent une réglementation plus détaillée de nouveaux éléments de la procédure.

Une autre conséquence du raisonnement propre aux sciences de la nature est que, du fait de l'extension des possibilités qui s'offrent à la découverte, à la connaissance et à la preuve des infractions, il devient nécessaire de procéder à l'appréciation en soi et dans ses connexions d'un nombre toujours plus grand de données d'information. Tout cela a pour conséquence de rendre plus difficile la prise des décisions, le choix des données permettant d'argumenter d'une manière suffisante et probante les décisions rationnelles finales. Il faut enfin signaler les changements apportés par la mise en œuvre des possibilités offertes par le traitement mécanique ou automatique des informations et par l'élaboration des solutions pratiques qui y sont liées.

Les connaissances scientifiques obtenues en règle générale grâce au concours des experts, l'importance de la collaboration des divers experts s'est

libre appréciation des preuves (p. ex. le C. pr. p. RSFSR); quelquefois c'est un règlement d'un niveau inférieur qui dispose de même, sur la base des directives formulées par la loi (art. 68. Code de Pr. pén. hongr). Nous trouvons un vaste résumé international des dispositions de droit positif concernant la question dans les documents du 10e congrès de l'AIDP (Athènes) (Revue Internationale de Droit pénal, Paris, 1—2)1960.

[21] Cf. ENGELS: *L. Feuerbach et la fin de la philosophie classique allemande.* (Trad. hongroise) Marx—Engels: Œuvres Choisies. Budapest, Kossuth, 1966. p. 335.

[22] Lors de certains crimes ou délits, les preuves matérielles peuvent être d'un tel volume ou en un nombre si grand (p. ex. une chaussée, une maison construite avec un béton ne répondant pas aux prescriptions technologiques, un grand réservoir explosé etc.) que leur examen ne peut se faire que sur la base d'échantillons, de petits morceaux extraits de ces matières. Pour les problèmes de procédure posés par ces cas, voir KERTÉSZ, I.: *Mintavétel és minták a büntető eljárásban* (Echantillonnage et échantillons dans la procédure pénale). MJ. 1971. pp. 532—535.

accrue donc de façon significative dans l'appréciation des éléments de la preuve. En conséquence, il semble d'une part de plus en plus nécessaire d'élaborer les solutions de procédure en connexion avec ces changements. D'un autre côté, il est nécessaire de bien tenir compte dans la mise en œuvre de ces solutions du fait que, pour contre-balancer l'importance de la participation des experts, il est nécessaire d'assurer aux autorités judiciaires la possibilité du contrôle, les moyens et les instruments de la critique, en faisant valoir entièrement le principe selon lequel l'expertise et le rapport de l'expert ne sauraient constituer qu'un élément seulement de la preuve, et que sa valeur doit finalement être appréciée par le juge.[23]

IV. La recherche sociologiques des faits concrets. Au-delà des facteurs que nous venons de signaler, il est un autre facteur encore qui joue un rôle fondamental dans l'évolution du raisonnement procédural. De nos jours le problème du caractère social du droit passe de plus en plus au premier plan, et cela non pas seulement dans la théorie générale de l'Etat et du droit socialistes,[24] mais aussi dans ses connexions pratiques. Le caractère socialement déterminé du droit est reconnu aujourd'hui, sous ce rapport également, comme l'un des critères fondamentaux les plus typiques du droit. Parmi les recherches de la sociologie juridique, celles fondées sur les données des jugements concrets, d'espèce et qui étudient les lois dynamiques générales du droit de ce point de vue (nous pensons ici également aux recherches des faits concrets et à l'analyse

[23] C'est peut-être sous le rapport de l'administration de la preuve, et en particulier de l'expertise fondée sur les connaissances techniques et scientifiques, que le développement du raisonnement procédural a entraîné des modifications importantes dans la règlementation de droit positif. Sous ce rapport, l'élément le plus caractéristique est l'expertise obligatoire en vertu de la loi (cf. à ce propos NAGY: *Témoignage* pp. 466—467). Pour la preuve par expertise, voir un aperçu critique de la littérature étrangère dans les monographies hongroises de SZÉKELY, J: *Szakértők az igazságszolgáltatásban* (Experts dans l'administration de la justice). Budapest, Közgazdasági és Jogi Kiadó, 1967. p. 607; de GÖDÖNY, J.: *A bizonyítás a nyomozásban* (L'administration des preuves au cours de l'enquête). Budapest, Közgazd. Kiadó, 1967. pp. 248 et suiv. et CSÉKA, E.: *A büntető ténymegállapítás elméleti alapjai* (Bases théoriques de la constatation des faits). Budapest, Közgazd. Kiadó, 1968. p. 362). Dans la littérature étrangère, nous nous référerons à la monographie de Петрухин, И. Л.: *Экспертиза как средство доказывания в советском уголовном процессе* (L'expertise comme moyen de preuve dans la procédure pénale soviétique). Moscou, Ed. Издат. «Юридическая литература», 1964. p. 264).

[24] Dans la littérature hongroise, voir les thèses de SZABÓ, IMRE présentées à la conférence scientifique *Sur les voies nouvelles de la recherche dans les sciences juridiques.* ÁJ. 1971. pp. 597—602. Quelques années plus tôt, l'ouvrage de KULCSÁR, K.: *A szociológiai gondolkodás fejlődése.* (Le développement du raisonnement sociologique). Budapest, Akadémiai Kiadó, 1966. pp. 502. et suiv.) avait démontré, au cours de l'examen de l'importance de la conception sociologique, que le raisonnement juridique marxiste était partie dès l'origine en tant que partie intégrante de la pensée sociologique. KULCSÁR indiquait que la façon de voir sociologique constituait un élément inaliénable des sciences juridiques marxistes, et que pour cette raison même, le développement des sciences juridiques était inconcevable sans l'étude concrète des phénomènes sociaux qui constituent le contenu du droit. Pour les rapports entre le droit, la sociologie et la psychologie, voir JORION, E.: *De la sociologie juridique.* Bruxelles, Université libre de Bruxelles, 1967. pp. 77 et suiv, qui donne également une bibliographie très détaillée de la littérature de la question (pp. 241—245).

des opérations effectuées au cours de celles-ci) agissent sur l'évolution du raisonnement en droit de procédure pénale également. En effet, les conclusions généralisées tirées des résultats de la recherche en sociologie juridique exercent une action sur les jugements concrets, individuels, même si cet effet ne se fait sentir que par l'entremise de plusieurs échelons intermédiaires. L'étude sociologique de la juridiction pénale d'espèce est particulièrement utile également dans l'élaboration de la décision pénale concrète, individuelle. On voit intervenir ici un grand nombre de facteurs que l'on peut examiner et apprécier en tant que phénomènes sociologiques aussi. De plus, le jugement concret constitue, de par son effet social lié à la réalisation de son but individuel et social, un phénomène social extrêmement complexe. On peut l'étudier en tant que tel, de ce point de vue également, et les conclusions de cette analyse peuvent être ensuite mises à profit dans l'orientation de principe des décisions d'espèce.

L'effet exercé par ces phénomènes intervenant dans la juridiction pénale et susceptibles d'une étude proprement sociologique, sur le processus de l'élaboration des décisions au cours de la formation du jugement pénal, pose lui aussi un très grand nombre de problèmes qui se rattachent aux questions précédentes. Parmi ceux-ci, soulignons l'importance des recherches sociologiques qui étudient (en recourant à l'analyse détaillée des données fournies par les affaires concrètes[25]) les facteurs qui, entre autres influencent le processus de l'élaboration des décisions à caractère collectif, portées par des juridictions collégiales, par les chambres des tribunaux.[26] D'autres recherches sociologiques concrètes donnent également quelques lumières sur des questions importantes: ainsi l'étude de la cause des erreurs judiciaires,[27] ou bien encore les recherches trai-

[25] Pour la nécessité de ces recherches, voir Popov, P.: *Moderne Methoden des sozialistischen Denkens bei der Argumentation in Staats- und Rechtstheorie.* = Raisonnement juridique. pp. 559 et suiv. Pour l'utilisation des méthodes de la statistique judiciaire, voir ibid. pp 563—564, ainsi que Петрухин, И. Л.: *Количественные методы изучения судебных ошибок по уголовным делам.* = *Проблемы правовой кибернетики* (Méthodes qualitatives dans l'étude des erreurs contenues par les décisions de la juridiction pénale = Problèmes de la cybernétique juridique). Moscou, 1968. p. 153. Pour le rôle du droit dans le mesurage des phénomènes sociaux, voir Vengerov, A. V.—Nikitinski, V. I.—Samochtchenko, I. S.: *La méthodologie générale de la jurimétrie* (Trad. hongroise) MJ. 1971. p. 104. Les auteurs soulignent que le droit est un excellent domaine d'application de la sociologie mathématique, étant donné que le fait même que la norme constitue un étalon de mesure, signifie du même coup qu'au moment d'opérer la régulation des phénomènes sociaux, le droit se présente comme leur unité de mesure. Pour le pronostic juridique en tant que processus de rassemblement d'informations scientifiques sur l'état futur des phénomènes concernant l'Etat et le droit voir Сафанов, P. A.: *Прогнозирование и юридическая наука* (La prognostisation de la science juridique). SGP. 3/1969. p. 93.

[26] Dans mes articles sur l'élaboration des décisions des chambres des tribunaux pénaux (*A büntetőbírósági tanács döntésének kialakulása.* JK. 1970. pp. 523—532 et 1972. pp 51—55) j'ai examiné plus en détail sous ce rapport les résultats de la recherche empirique et de sociologie du droit effectuée dans les années 1965—1966 dans la République Populaire Polonaise, et en 1968 en Hongrie, à propos de certains aspects des activités des assesseurs populaires.

[27] Voir à ce propos pour certains problèmes de méthode Петрухин, И. Л.: Количественные методы (Les méthodes quantitatives). pp. 153—156, et Петрухин, И. Л.: *Причина судебных ошибок* (Causes des erreurs judiciaires). SGP. 5/1970. pp. 100—107.

tant du rôle des facteurs sociaux et historiques dans le processus de la décision etc.[28]

Un autre phénomène important, qui se prête lui aussi à l'étude sociologique, est — à côté de l'appréciation par l'opinion publique de la sanction pénale légale, appréciation naturellement changeante[29] — l'effet exercé par la décision pénale elle-même sur l'opinion publique, ainsi que la rétroaction de celle-ci sur la juridiction. La recherche sociologique poursuivie dans le premier de ces sens analyse jusque dans le détail aussi bien l'effet individuel de la décision pénale concrète que sa force de prévention générale, en tant que phénomène social. Dans le second cas, la rétroaction dont nous parlons se rattache déjà, en partie, au problème de l'action des effets sociaux telle qu'elle s'exerce à travers la personne du juge.[30]

En effet, parmi les facteurs sociaux agissant sur la décision pénale, d'autres aussi peuvent avoir un rôle important. Ainsi non pas seulement ceux qui agissent directement, mais encore les facteurs qui se rattachent de façon aléatoire à la personnalité, qui façonnent la conscience des juges, ainsi que divers autres facteurs de caractère psychologique qui se présentent pour des raisons diverses dans la formation de la décision concrète. Le champ d'action de ces facteurs est également très important, mais il représente un domaine insuffisamment exploré, compte tenu de son importance.[31]

A côté de ces sources, ces recherches possèdent une assez large littérature en droit soviétique. Il convient de signaler ici que, sans y compter le matériel à sensations extrêmement vaste, cette question des erreurs judiciaires possède une littérature très importante en occident. A côté des ouvrages scientifiques et journalistiques bien connus (E. SELLO, R. FLORIOT, etc.), notons parmi les ouvrages récents le livre à caractère scientifique de PETERS, K.: *Fehlerurteile im Strafprozeß*. Bd. 1. Einführung u. Dokumentation. Karlsruhe, Verl. Müller. 1970. 574 p., qui étudie la question sur la base des jugements de cassation.

[28] Cf. p. ex. dans la littérature hongroise KULCSÁR, K.: *A szituáció jelentősége a jogalkalmazás folyamatában*. ÁJ. 1968. pp. 545—571, et KULCSÁR: *A jogalkalmazás funkcionális elemzésének problémái*. ÁJ. 1969. p. 615. (Importance de la situation dans le processus de l'application du droit; et: Problèmes de l'analyse fonctionnelle de l'application du droit).

[29] Nous trouvons le compte-rendu des résultats d'une investigation de ce genre chez LÉAUTÉ, J.—TUBACH, G.—BASSOMPIÈRE, G.: *Sondage sur l'estimation de la gravité comparée des principales infractions*. pp. 111—150 = L'Année sociologique. Paris 1971. PUF 556 p.

[30] Pour le côté théorique de ces questions, voir dans la littérature hongroise diverses études de KULCSÁR: *A közvélemény és a jog* (L'opinion publique et le droit). JK. 1961. pp. 22 et suiv; *A közvélemény mint szociológiai jelenség* (L'opinion publique en tant que phénomène sociologique). MFilSZ. 1962. pp. 397—420. Pour les rapports entre le jugement et l'opinion publique voir à l'étranger Любавин А. А.: *Приговор и общественное мнение* (Опыт социологического исследования) (Le jugement et l'opinion publique. Essai de recherche sociologique). pp. 106—108. = Тезисы докладов и научных сообщений на межвузовской теоретической конференции. Moscou, Ed. Издат. Московского Университета, 1966. 114 p. p. 114; Перлов, И. Д.: *Исследования в области уголовного процесса* (Recherches dans le domaine de la procédure pénale). SGP. 8/1967. p. 105. En occident: PFENNINGER, H. F.: *Probleme des schweizerischen Strafprozeßrechtes*. Zürich, Verl. Schulthess, 1966. pp. 332 et suiv.

[31] Pour la littérature des effets sociaux caractérisant personnellement le magistrat procédant dans le cas d'espèce, ou agissant sur lui à travers divers éléments psychiques,

L'étude des résultats de la juridiction pénale du point de vue de la sociologie juridique, et spécialement de la sociologie criminelle, est d'une extrême nécessité pour l'orientation également de la politique poursuivie par l'Etat en matière pénale. Ainsi les décisions formées sur la base des décisions prises dans les cas d'espèce (à partir donc des données et des connexions concrètes), rétroagissent par l'entremise de la politique pénale générale sur les décisions d'espèce. C'est ce mécanisme qui doit assurer le maintien d'un contact permanent et vivant entre la pratique et la direction de principe. Cependant les exemples mentionnés à titre illustratif indiquent que malgré le fait que la nécessité de procéder à des recherches de détail est devenue inéluctable (et cette conception représente sans doute une tendance nouvelle dans l'évolution du raisonnement en matière de procédure), la sociologie juridique a encore fort à faire dans ce domaine, aussi bien dans le développement des méthodes et de la recherche concrète que dans l'analyse de ses résultats.

Le développement des sciences sociales, les résultats obtenus dans l'élaboration de leurs méthodes d'investigation et d'analyse, agissent essentiellement sur l'évolution du raisonnement du droit pénal de fond. Ainsi du point de vue du droit de procédure, ces résultats agissent eux aussi avant tout par éléments interposés. Ils signifient l'élargissement du champ des faits relevants dans les affaires pénales et posent certains problèmes intéressant la preuve et l'appréciation de ces faits. La situation est similaire en ce qui concerne les tâches préventives du procès pénal aussi.

Bien que sous certains rapports ces points de vue aient déjà pris forme en droit positif, les changements qui interviennent dans le droit de procédure apparaissent avant tout dans la direction de principe de la juridiction pénale et dans l'élaboration des problèmes théoriques qui la fondent.

Il convient de conclure cette analyse rapide de la détermination sociale du droit, en soulignant que dans la recherche des facteurs qui agissent encore sur le raisonnement procédural (y compris l'étude des interactions existant entre les phénomènes sociologiques et psychiques), l'analyse des effets sociaux des phénomènes psychiques révèle une connexion supplémentaire des phénomènes sociaux. Les effets qui s'exercent entre eux sont toujours réciproques. En effet ce ne sont pas seulement les facteurs sociologiques qui influent sur les phénomènes psychiques: l'interaction[32] se présente en sens inverse également.

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etc., voir NAGY, L.: *Le processus psychique de la formation des décisions du juge pénal.* Acta Juridica, 1972. pp. 72 et suiv. Pour les années précédentes, voir MIDDENDORFF, W.: *Die soziale Prognose und der Strafrichter* = Gerichtliche Psychologie. Berlin—Spandau, Luchterhand, 1962. pp. 33 et suiv., ainsi que BENDIX, L.: *Zur Psychologie der Urteilstätigkeit des Berufsrichters.* Berlin, Luchterhand, 1968. p. 94.

[32] Dans sa conférence sur les rapports entre la psychologie et les autres sciences, prononcée au 18e Congrès International de Psychologie (Moscou), Jean PIAGET avait formulé la thèse fondamentale suivante: il n'est pas nécessaire de prouver que la psychologie se rattache au moins dans la même mesure à la sociologie qu'à la biologie. (*A*

V. Les connaissances relatives au processus de la pensée. L'interaction que nous venons de signaler entre les facteurs à caractère sociologique et psychique montre bien déjà combien il est difficile de délimiter les phénomènes agissant sur la juridiction pénale et qui demandent à être examinés de ces deux points de vue. Une autre difficulté de cette délimitation vient du fait également que le raisonnement, en tant que phénomène psychique, ne peut en fait se délimiter des facteurs biologiques par exemple, collaborant au processus, des fondements biologiques de l'activité psychique etc., que du point de vue de la recherche, de l'analyse. Dans la pratique, dans l'évolution des phénomènes de conscience, tous ces facteurs n'agissent que dans leurs interconnexions. L'un des particularités fondamentales du processus du raisonnement est que le reflet de la réalité objective agissant sur l'organisme humain représente toujours un phénomène psychique. Une autre de ces particularités est que le processus de raisonnement ne saurait être séparé de son fondement philosophique,[33] pas plus que du problème fondamental de la logique: du problème de la vérité, en tant que rapport cognitif de la pensée à l'être. Le psychique, le processus de la connaissance et de la pensée, précède, prépare l'activité logique, l'impératif fondamental donc de la décision. Il se déroule toujours en corrélation réciproque avec ce dernier.

Les résultats de la psychologie judiciaire influent de plusieurs façons sur le raisonnement procédural. Il semble que parmi ces recherches, les plus importantes sont celles qui, en liaison étroite avec la conception dynamique déjà signalée de l'infraction, analysent le processus psychique qui se déroule dans la conscience de l'auteur de l'infraction en liaison avec son comportement, et qui recherchent, à partir de là également, les solutions permettant de réaliser ce qui constitue le but de la peine: la rééducation et la prévention.

D'autres recherches ont pour objectif d'analyser la psychologie de la décision, l'activité psychique des personnes qui participent d'office à la procédure (celle par exemple du ministère public, la fonction de la défense, le pro-

pszichológia új útjai (Voies nouvelles de la psychologie) = Le 18e Congrès international de Psychologie. Sous la réd. de Lénárd, F. Budapest, Kossuth, 1967. pp. 45 et suiv.) Dans la littérature hongroise récente, voir PAPP, Zs.: *A szociológia és a pszichológia határán: a csoportlélektan* (Sur les confins de la sociologie et de la psychologie: la psychologie du groupe). TSZ 1/1971. pp. 99—102. A propos des rapports entre la sociologie du droit et la psychologie judiciaire voir JORION (pp. 91 et suiv.), et plus récemment WEIMAR, R.: *Psychologische Strukturen richterlichen Entscheidungen* (Basel, Stuttgart, Helbig u. Luchterhahn, 1969. pp. 4—5) qui soulignent que l'effet psychologique des facteurs sociaux n'est pas moins important que celui des facteurs physiologiques.

[33] Des travaux philosophiques récents utilisables du point de vue de la théorie du droit de procédure, notons dans la littérature hongroise FÖLDESI, T.: *A marxista filozófia bizonyításelmélete* (La théorie de la preuve de la philosophie marxiste). Budapest, Kossuth Kiadó, 1967. 553 p. et FÖLDESI: *A megismerhetőség modern problémái* (Les problèmes modernes de la cognoscibilité). Budapest, Kossuth Kiadó, 1971. 327 p. Ces monographies donnent entre autres une critique détaillée de la littérature étrangère en la matière.

cessus de la décision), en tant que phénomènes de raisonnement particuliers.[34] Enfin, les recherches psychologiques qui étudient et analysent les connexions de certains phénomènes psychiques en liaison avec l'administration de la preuve (ainsi la psychologie de l'aveu de l'accusé, de la déposition de la victime ou du témoin), contribuent également à l'efficacité de la procédure pénale.[35]

Dans certains cas, l'effet exercé par les résultats de la psychologie judiciaire sur le raisonnement de la procédure pénale se présente déjà dans la réglementation positive. Certains codes de procédure déclarent par exemple de façon formelle qu'en cas de doute l'état psychique de certaines personnes participant à la procédure (p. ex. celui de l'accusé, de la victime ou du témoin) doit être analysé par un expert.[36] De plus, la pratique judiciaire a souvent recours à un expert psychologue, même dans le cas où la loi positive ne contient pas de disposition en ce sens. Ainsi pour l'examen de la personnalité de l'accusé, pour l'observation ou la constatation de certains éléments de la crédibilité de la victime ou du témoin mineur, etc. Malgré tout cela nous ne pouvons pas parler pour le moment de la mise en œuvre générale des méthodes psychologiques, de l'expertise psychologique, pour l'appréciation et l'établissement p.ex. de la crédibilité du témoignage.

Du fait des connexions déjà mentionnées existant entre les phénomènes psychiques et logiques, les nouveaux résultats de la science de la logique agissent eux aussi sur l'évolution du raisonnement du droit de procédure. Ce développement a contribué tout particulièrement à l'élaboration d'une conception qui

[34] Pour la littérature étrangère de la psychologie de la décision du juge, voir NAGY, L.: *Le processus psychique . . .* Acta juridica 1970. pp. 40 et suiv. Pour d'autres détails voir les monographies de BENDIX (1968) et WEIMAR (1969). Pour la théorie de la décision, voir dans la littérature psychologique MURÁNYI, M.: *Döntéselmélet és pszichológia* (Théorie de la décision et psychologie). MFilSZ. 1972. pp. 178—203. Pour les points de contact et la frontière entre la psychologie judiciaire et la psychologie du magistrat voir JORION (1967) pp. 85 et suiv.

[35] Pour la littérature étrangère traitant de la psychologie du témoignage, voir en détail certaines parties de ma monographie *Tanúbizonyítás a büntetőperben* (Témoignage dans le procès pénal). Budapest, Közgazd. Kiadó, 1966. et pour l'expertise psychologique tout particulièrement les pp. 505 et suiv. Dans la littérature publiée plus récemment, parmi les ouvrages soviétiques de psychologie appliquée, le livre de РАТИНОВ, А. Р.: *Судебная психология для следователей* (Psychologie judiciaire pour les enquêteurs). Moscou, Ed. Издат. Высшей Школы 1967. 228 p. est destiné à des buts pratiques. Les ouvrages les plus importants: GRASSBERGER, R.: *Psychologie des Strafverfahrens.* 2. Aufl. Wien, New York, Springer Verl. 1968; ALTAVILLA, E.: *Forensische Psychologie.* Bd. 1—2. Graz, Wien, Styria Verl. 1966. 392 p., 473 p.; MIRA Y LOPEZ, E.: *Manuel de psychologie judiciaire.* Paris, 1959. PUF. 313 p.

[36] Ainsi p. ex. le C. pr. p. de la RSFSR ordonne dans son Art. 2 points 2 et 3, l'examen obligatoire par expert de l'état psychique de l'accusé, ainsi que de la victime et du témoin, en cas de doute quant à leur imputabilité, respectivement de leur capacité de témoigner. Des Art. 116 et 118 du C. pr. p. tchécoslovaque permettent l'examen par expert de l'état psychique (*duševni*) de l'accusé et du témoin; le C. pr. p. polonais ordonne dans son Art. 183 l'examen de l'état psychique de l'accusé par un médecin psychiatre etc. Mon étude sur *Quelques problèmes relatifs à l'expertise psychologique du témoin dans le procès pénal* (Revue de Science Criminelle. Paris, 1970. pp. 355—372) examine en détail la littérature étrangère concernant certaines questions particulières.

est déjà dominante dans les sciences juridiques socialistes, à savoir: le raisonnement propre à la logique formelle, et l'argumentation qu'elle fonde, sont indispensables dans la pratique du droit de procédure pénale, mais ils ne suffisent pas.[37]

Sans entrer dans la discussion de l'importance de la logique formelle, ni des connexions et des différences qualitatives indiscutables[38] qui existent entre d'une part la logique formelle orientée sur la forme du raisonnement, et d'autre part la logique dialectique qui décrit, elle, la généralité concrète, et met en avant le contenu de la pensée, il ne fait pas de doute que dans les procédures pénales socialistes, lors de l'analyse du côté logique de la juridiction pénale, ce sont les résultats présentés par la recherche en logique dialectique[39] qui sont avant tout susceptibles d'êtres mises à profit. Le raisonnement dialectique est complexe: il part de la dépendance réciproque des phénomènes et des faits, ainsi que de leurs interconnexions. Il est dynamique également, car il prend en considération le cours ininterrompu des changements sociaux, et par conséquent le fait que l'objet même de la logique dialectique est l'étude des phénomènes dans leur développement, dans le processus permanent de leurs modifications. Dans la formation des décisions pénales, *il n'est possible d'appliquer* les règles relatives au contenu et à la forme de la pensée *qu'à des éléments* (des concepts, des énoncés — jugements, syllogismes, au sens philosophique) qui sont *vrais aux termes de la gnoséologie matérialiste*, en tant que constatations de faits: qui manifestent la vérité, qui reflètent donc la réalité objective d'une manière adéquate. Dans tout le cours de la procédure, et en particulier dans toutes les opérations, toutes les décisions qui conduisent à l'élaboration du jugement, dans l'application des règles du droit à la constatation des faits — c'est toujours la constatation des faits qui reflète de façon adéquate la réalité objective, *toutes les connexions importantes* qu'il met en évidence, que nous de-

[37] Nous trouvons des indications en ce sens dans SZABÓ, I.: *A jogszabályok értelmezése* (L'interprétation des règles juridiques). Budapest, Közgazd. Kiadó, 1960. pp. 10. et 196.; ainsi que chez ПЕРЛОВ, И. Д.: Приговор в советском уголовном процессе (Le jugement dans le procès pénal soviétique). Moscou, 1960. pp. 13—14 et récemment chez CETERCHI, I.: *Le rôle de la dialectique matérialiste dans la pratique du droit* = Raisonnement juridique. pp. 447 et suiv. Pour l'interprétation de la logique juridique en rapport avec l'argumentation, voir KLUG, U.: *Juristische Logik*. Berlin, Heidelberg, New York, Springer Verl. 1966. p. 7.

[38] Ces problèmes sont analysés dans l'ouvrage récent de ERDEI, L.: *Az ítélet dialektikus logikai elmélete* (La théorie de logique dialectique du jugement). Budapest, Akadémiai Kiadó, 1971. pp. 17—18.

[39] Les exigences fondamentales posées aux opérations logiques appliquées tout au long du processus de la juridiction pénale, et donc lors de l'élaboration du jugement définitif du magistrat, sont les mêmes que ceux formulés par LÉNINE (*Encore une fois des syndicats*. Trad. hongroise. Œuvres, tome 32, Budapest, Szikra, 1953. p. 87.) vis-à-vis de la logique dialectique: saisir l'objet sous tous ses aspects, dans toutes ses connexions et médiations, considérer les objets dans leur développement, dans leur mouvement propre et dans leur modification, participer par l'action pratique humaine à la définition totale de l'objet, et appliquer cette thèse de la logique dialectique selon laquelle «il n'y a pas de vérité abstraite, la vérité est toujours concrète».

vons considérer comme le contenu fondamental du raisonnement sur lequel se base la décision dans la procédure pénale socialiste.

Les recherches qui étudient à propos de l'application du droit[40] les problèmes du raisonnement juridique, mettent également à jour les aspects logiques du processus de l'élaboration de la juridiction pénale, et fournissent ainsi certains points d'appui pour le contrôle d'un élément de contenu très important de la décision, et par là, de l'argumentation de la décision. Cela ne veut pas dire que nous reconnaissions le bien fondé d'une « logique juridique » autonome,[41] mais il est indubitable qu'il est nécessaire de recourir dans le domaine du droit également à des opérations, des séries d'opérations, à des systèmes opérationnels typiquement logiques, d'un caractère particulier, et en général complexe. Ces opérations ont leur rôle à jouer dans les deux activités juridiques fondamentales à la fois: dans la législation aussi bien que dans l'application du droit, mais ce rôle y est différent, tant du point de vue de son importance que de la tendance qu'elles représentent.

Les recherches de logique appliquée les plus récentes traitent avant tout des problèmes logiques de la législation.[42] Ces recherches n'ont que des rapports incidentaires avec le raisonnement procédural. Cependant, les travaux de détail qui traitent de la logique proprement procédurale[43] indiquent avec force combien la logique constitue un élément nécessaire du raisonnement du droit de procédure pénale, en tant que fondement de l'argumentation et de la motivation sous-tendant la mise à jour des connexions causales dans la phase de l'in-

[40] Nous devons signaler ici aussi les particularités de la logique heuristique dans la phase de l'enquête, et celles de la logique de la preuve si importante dans l'argumentation du jugement. Pour la littérature étrangère, voir NAGY, L.: *A büntetőbírói döntés pszichológiája* (Psychologie de la décision du juge en matière pénale, pp. 458—459.)

[41] Pour la littérature concernant les points de vue différents de la logique du législateur et de la logique de l'application du droit, et les connexions mutuelles de ces logiques, et pour notre position niant l'existence d'une logique juridique autonome, voir plus en détail NAGY, L.: *A büntetőbírói döntések logikai szerkezetének néhány kérdése* (Quelques problèmes de la structure logique des décisions du juge en matière pénale). ÁJ. 1972. pp. 663 et suiv. La même thèse est formulée par ailleurs récemment par COSMOVICI, P.: *La logique juridique et les autres sciences* = Raisonnement juridique. p. 463. Selon COSMOVICI, les logiques « spéciales » ou spécialisées, ne sont que des systèmes de logique formelle correspondant à l'objet des diverses sciences. Pour certains éléments logiques de la sentence pénale, voir récemment KIRÁLY, T.: *Büntetőítélet a jog határán* (Le jugement pénal à la limite du droit). Budapest, Közgazd. Kiadó, 1972. pp. 157 et suiv.

[42] Il en est ainsi par exemple de certaines études du recueil: Le raisonnement juridique, contenant le matériel du congrès organisé du 30 août au 1er septembre 1971 par l'Université Libre de Bruxelles. De même les recueils publiés par le Centre National de Recherches de Logique de Bruxelles (Etudes de logique juridique. Vols. 1—4. Bruxelles, 1966—1970. Ém. Bruylant) traitent également en général, de préférence, de la logique du législateur.

[43] Cf. p. ex. Старченко, А. А.: *Логика в судебном исследовании* (La logique dans les enquêtes judiciaires). Moscou, Ed. Издат. Высшей Школы 1967. 288 p., et plus récemment Ейсман, А. А.: Логика доказывания (La logique de l'administration des preuves). Moscou, Ed. Издат. «Юридическая литература.» 1971 p. 110.

vestigation, et l'élaboration de la décision dans la phase de la décision et du jugement.[44]

Quant à l'application directe du raisonnement de la logique mathématique au domaine de la pratique procédurale, les résultats de la recherche des sciences juridiques n'offrent pas encore, à notre sens, d'éléments utilisables.[45] Par contre, l'utilisation des principes de la cybernétique et des modèles fondés sur ces derniers,[46] l'application de ces mécanismes dans la procédure pénale présentent déjà des résultats qui ne sont pas simplement théoriques, mais bien pratiques dans de nombreux domaines (dans la fourniture des informations nécessaires à l'investigation, aux possibilités de preuves et à la décision définitive, au cours de la préparation de la décision).[47] Il ne faut cependant pas perdre de vue qu'il est une circonstance dans l'élaboration des décisions définitives de la juridiction pénale qui écarte pour longtemps encore, dans les décisions d'espèce, la mise en œuvre de la cybernétique. L'une des opérations fondamentales de ce processus: l'appréciation individuelle, qui fait que la décision du magistrat ne peut en effet, en aucun cas se borner à des systèmes syllogistiques purement logiques: cette opération ne saurait être remplacée par des procédés mécaniques dans le cours du processus de l'élaboration du jugement.[48]

[44] Pour la littérature étrangère concernant le rôle des éléments logiques dans la décision du juge, voir. NAGY, L.: *A büntetőbírói döntések logikai szerkezetének néhány kérdése* (Quelques problèmes de la structure logique des décisions du juge en matière pénale). ÁJ. 1971. pp. 662. et suiv.

[45] Cf. de même KIRÁLY: *Büntetőítélet* (Le jugement pénal) p. 60.

[46] Pour la littérature récente en cybernétique et en particulier en théorie de l'information, voir KIRÁLY, 1972, pp. 57 et suiv. Dans les autres pays socialistes, les études publiées dans les recueils *Правовая кибернетика* (Cybernétique juridique). Moscou, 1968 et 1970; et: *Fragen der Kybernetik und das Recht.* Bd. 1 Sektion II (trad. du volume de 1967 de Вопросы кибернетики и право, Potsdam—Babelsberg, 1969. ronéotypé, 171 p.) traitent avant tout de divers problèmes théoriques du droit et de la procédure pénale. A l'ouest, dans un ouvrage précédent, M. LOSANO, (*Giuscibernetica. Machine e modelli cibernetici nel diritto.* Torino, Edit. Einaudi, 1969) estime possible d'exprimer en 12 points la théorie du modèle cybernétique du droit. Il a résumé récemment une fois de plus ces thèses (*Zwölf Thesen über die rechtskybernetische Modelltheorie.* = Raisonnement juridique. pp. 93—97.). Selon LOSANO, la cybernétique juridique suit deux directions générales: celle de l'informatique juridique et celle de la théorie du modèle cybernétique-juridique (ibid. p. 93). Du point de vue du droit de procédure, ces deux directions de la recherche peuvent avoir une égale importance.

[47] Il en est ainsi p. ex. des services d'informations mécanisés on automatisés, des fichiers des lois et réglements, du casier judiciaire, du domaine de la pratique des tribunaux pénaux dans les cas d'espèce et dans les décisions de principe etc. Nous devons également mentionner l'utilisation des méthodes de traitement mécanique des renseignements dans certaines procédures d'enquête (p. ex. l'identification graphologique, l'enquête menée sur la base du modus operandi etc.). Pour l'étude de la documentation juridique voir Петрухин, *Количественные методы* (Les méthodes quantitatives) p. 154 etc. Pour la littérature du traitement mécanique et automatique des données juridiques, voir mon étude *A jogi informatika előkérdései* (Problèmes préalables de l'informatique juridique). ÁJ. 1969. pp. 654 et suiv. Plus récemment, l'ouvrage de HAFT, F.: *Elektronische Datenverarbeitung im Recht.* Berlin, J. Schweitzer Verl. 1970. 209 p. traite avant tout de problèmes juridiques pratiques de caractère général.

[48] LOSANO (*Zwölf Thesen*, p. 96) déclare dans sa thèse fondamentale que lors de la confection des modèles cybernétiques, il convient de réduire au maximum, ou d'écarter totalement, l'appréciation libre individuelle. l'automatisation exclue toute inter-

Nous devons signaler encore sur ce point les recherches qui traitent de la théorie des modèles du raisonnement. Le but de l'élaboration des modèles est de créer par voie d'abstraction, pour faciliter la recherche, un schéma reflétant de façon adéquate les propriétés les plus importantes des phénomènes, leurs connexions spatio-temporelles et matérielles.[49] L'emploi des modèles constitue en effet une méthode utilisable dans la préparation des décisions pénales également. Et cela nonobstant le fait qu'il s'agit ici de connaître non pas des lois générales, mais des phénomènes purement individuels, concrets, et aussi malgré le caractère encore assez peu élaboré des détails de ce procédé. Parmi les méthodes (statiques ou fonctionnelles), empruntées de préférence dans les débuts à celles appliquées en physique, c'est la théorie et la pratique des modèles ontologiques, gnoséologiques et logiques qui sont le mieux applicables dans la procédure pénale, si nous nous référons à la classification des modèles qui répond aux problèmes soulevés par la procédure pénale et à la nature des phénomènes étudiés.[50]

Dans ce qui précède, nous n'avons même pas pu effleurer les autres facteurs qui peuvent également jouer dans l'élaboration des décisions prises. Ainsi, nous n'avons pas pu traiter des facteurs biologiques, physiologiques etc. qui interviennent dans le processus du raisonnement, bien que leur action fût empiriquement bien connue et que les recherches sur le fonctionnement du cerveau p.ex., avec toutes ses connexions biochimiques, bioélectriques etc., constituent de nos jours l'un des domaines les plus importants des sciences naturelles. Nous n'avons pas pu toucher non plus les problèmes de l'applicabilité de la logique déontique. Malgré ces lacunes, il nous faut clore cet exposé des possibilités de l'application des résultats de recherche relatifs au procès du raisonnement en constatant que la connaissance des particularités des opérations effectuées au cours de la procédure pénale et dans l'élaboration de la décision, y compris celles des décisions concrètes, individuelles, à caractère dissemblable, permet d'une part un meilleur contrôle des processus de décision. D'un autre côté, l'orientation consciente du raisonnement qui constitue le fondement des décisions, et l'exposé de son contenu essentiel dans les considé-

prétation. C'est là l'un des obstacles techniques-juridiques les plus importants des méthodes cybernétiques.

[49] Cf. Horváth, I.: *A modellalkotás mint tudományos kutatási módszer* (La confection de modéles en tant que méthode de recherche scientifique). MFilSZ. 1965. pp. 161—162. Pour les possibilités d'application des modèles au procès pénal, voir Патинов, ouvrage cité, p. 122. Récemment, Ейсман (op. cit. p. 80) cherche à élaborer un modèle qualitatif en liaison avec la comparaison des éléments de la preuve.

[50] Ainsi p. ex. au cours de l'expertise, l'expert établit un modèle *ontologique* pour exprimer et analyser les rapports existant entre deux choses, deux phénomènes objectifs, réels; les rapports entre la réalité objective et la constatation des faits qui en exprime le reflet subjectif constituent un modèle *gnoséologique*; et enfin, l'infliction de la peine basée sur ce modèle constitue un rapport entre deux images-reflet subjectives, donc un modèle *logique*.

rants du jugement,[51] sont un des éléments les plus importants de la force persuasive des décisions judiciaires.

VI. La médiation des changements intervenant dans le raisonnement. Le droit de procédure est un système de normes en ce sens que l'activité des organismes chargés de l'application du droit, la détermination des objectifs de leurs actes de procédure, l'ordre et la forme de ces derniers, sont soumis à des règles juridiques spéciales.[52] L'exécution de ces normes se heurte souvent dans la pratique à des difficultés auxquelles il convient de trouver une solution. L'effet des facteurs qui agissent sur la modification du raisonnement en matière de procédure pénale se présente aussi bien dans l'apparition de problèmes nouveaux qu'en liaison avec la solution des tâches anciennes et nouvelles de la procédure, et il agit naturellement sur la réglementation en droit positif également. Ce sont les instances chargées de l'application du droit qui signalent les problèmes surgis au cours de la pratique à l'intention du législateur. L'effet qui s'exerce en les deux activités juridiques fondamentales: la création, l'élaboration du droit et l'application du droit, est réciproque. En créant une norme générale, abstraite, la logique du législateur détermine et oriente l'activité pratique concrète de celui qui applique le droit. Les expériences pratiques, les informations, les signalisations recueillies au cours de l'application du droit sont analysées d'une manière critique par le législateur. Cette analyse se réalise dans le cours du perfectionnement du système juridique, sous le rapport de la correction, de l'efficience et de l'adéquation de la règle de droit, et des problèmes de son application, de sa mise en œuvre dans la période historique donnée etc. Par contre, de son côté, celui qui applique le droit, doit se ranger à la logique du législateur: il doit mettre en évidence la règle juridique sous tous ses aspects — sociaux, politiques, juridiques[53]—, et dans ses effets pratiques. Simultané-

[51] Pour les règles logiques de la décision, voir KIRÁLY: *Büntetőítélet* (Le jugement pénal). pp. 157 et suiv. Pour la littérature étrangère concernant les motifs du jugement, voir mon étude sur: *A bűnösséget megállapító ítélet indokolása* (l'exposé des motifs de la sentence établissant la culpabilité). ÁJ. 1966. pp. 625 et suiv.

[52] KOVÁCS, I.: *A törvénykoncepció alakulása* (Evolution de la conception de loi). A Magyar Tudományos Akadémia IX. Gazdaság- és Jogtudományok Osztályának Közleményei, 1966. p. 76. L'auteur souligne à un niveau général que le droit possède un caractère régulateur des processus. A son avis, ce n'est pas la loi, par elle-même, qui donne naissance aux processus sociaux, mais c'est elle qui détermine les points de rencontre contingents où elle désire faire appel à la force coercitive du pouvoir public.

[53] Pour les tâches intéressant l'application du droit en connexion avec le contenu modifié des notions en usage dans les règles du droit pénal matériel, du fait des changements sociaux-politiques et économiques, voir VÁGÓ, T.: *A Legfelsőbb Bíróság elvi irányító és ítélkező tevékenysége a szocialista társadalom építésének időszakában* (Les activités de direction et de juridiction de principe de la Cour Suprême dans la période de l'édification de la société socialiste). MJ. 1970. pp. 148 et suiv. Pour les connexions générales entre l'application du droit dans les cas d'espèce et la législation, voir SZAKÁCS, Ö.: *A Legfelsőbb Bíróság gyakorlata és a kodifikáció* (La pratique de la Cour Suprême et la codification). MJ. 1970. pp. 1—10. Plus récemment, la même question est traitée plus en détail par SZABÓ—NAGY T.: *A Legfelsőbb Bíróság gyakorlata és a büntető eljárás kodifikációja* (La pratique de la Cour Suprême et la codification de la procédure pénale). MJ. 1971. pp. 395—404, 466—474 et 523—521. Nous trouvons quelques exemples empruntés

ment, il doit en permanence fournir, transmettre au législateur les signalisations, les informations indiquées plus haut. Ces signalisations passent par un mécanisme adéquat, dont l'élaboration est elle-même une tâche qui agit sur le raisonnement en matière de procédure, mais il nous est impossible ici d'entrer dans ses détails. Il convient toutefois de noter à propos de cette activité que cette conception du droit en tant que phénomène réglementant un processus, exprime également un autre trait spécifique du droit. Cela signifie, que l'analyse de l'application ou de la non-application du droit, la mise en évidence de certains éléments au cours de cette analyse, et l'établissement de certaines conclusions à partir de là, se fait — à côté des signalisations provenant de la pratique de l'application du droit[54] — par la voie de la jurimétrie, par des mesurages d'un type spécial. Ainsi les signalisations fournies de façon continue par l'application du droit rétroagissent en permanence sur les activités législatives également.[55]

En analysant les éléments de médiation des facteurs déterminant l'évolution du raisonnement en droit de procédure les modifications intervenant dans l'élaboration du droit positif,[56] il nous faut constater que, selon les expériences les plus générales des nouveaux résultats de la codification des droits de procédure socialistes, il existe entre les règles du droit positif des pays socialistes des similitudes essentielles quant aux principes de base. Aux changements intervenus dans le raisonnement en matière de procédure, les règles de droit ont réagi de façon identique, ou presque identique, ainsi que nous avons cherché à le démontrer dans certains cas concrets, à titre d'illustration. Mais

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à la pratique hongroise sur certaines connexions entre la logique du législateur et la logique de l'application du droit, ainsi que p. ex., de façon plus concrète, sur la réglementation en droit positif intervenue sur la base des signalisations fournies par la pratique de l'application du droit, dans NAGY, L.: *A büntetőbírói döntések logikája* (La logique des décisions du juge en matière pénale). pp. 666 et suiv. Pour les interactions entre la législation et l'application du droit, et en particulier, pour les interconnexions théoriques existant entre la politique de la législation et la politique de l'application du droit, voir SZABÓ: *A jogszabályok értelmezése* (L'interprétation des règles juridiques). pp. 222—224., ainsi que KULCSÁR: *A jogalkalmazás funkcionális elemzésének problémái* (Problèmes de l'analyse fonctionnelle de l'application du droit). ÁJ. 1969. p. 603, et KULCSÁR: *A népi ülnök részvétele a bírói döntésben* (Participation de l'assesseur populaire à la décision du juge). ÁJ. 1971. p. 9. Dans la littérature soviétique voir Перлов (1960. p. 17).

[54] Selon la décision de la réunion plénière de la Cour Suprême de l'URSS (décision No. 21/ 1971; voir BVS SSSR, No. 4 1971, p. 8), dans l'esprit de la résolution du XXIV[e] Congrès du PCUS, il est de la tâche de la Cour Suprême de suivre régulièrement les activités des tribunaux au plan de l'application du droit, er de formuler à partir de là, en temps opportun, les questions à résoudre dans le domaine du développement de la législation soviétique. Il convient à ce propos de consolider les rapports avec la science juridique et d'introduire dans la pratique judiciaire la prise en considération des résultats de la recherche.

[55] Cf. VENGEROV, A. B. —NIKITINSKY, V. I.—SAMOCHTCHENKO, I. Sz. *Méthodologie générale de la jurimétrie* (A jogi mérések általános módszertana Trad. hongroise). MJ. 1971. p. 104.

[56] Галкин, Б. А.: *Советский уголовно—процессуальний закон.* (La loi soviétique sur la procédure pénale). Moscou, 1962. Ed. Издат. «Юридическая литература» 253 p. résume les principes des travaux de codification poursuivis en Union Soviétique en 1958—1960.

pour certains détails, par contre, et en particulier là où le développement ne nécessite pas des solutions identiques, on rencontre souvent des solutions divergentes, répondant aux particularités du pays donné. Un autre phénomène que nous pouvons également considérer comme général, c'est qu'en règle générale, la réglementation positive du droit de procédure pénale va dans le sens de l'élaboration de solutions plus détaillées, d'une réglementation plus exhaustive des institutions et des actes de la procédure.[57]

Nous ne rencontrons plus la même homogénéité parmi les résultats du droit positif des pays socialistes sous le rapport du problème technique suivant: faut-il que les problèmes de procédure soient réglementés uniquement par la loi même — par un code de procédure —; ou au contraire, les problèmes pratiques d'un niveau inférieur (inférieur soit quant à leur objet, à leur importance, soit quant à leur caractère relativement transitoire) peuvent-ils être réglementés par des règles juridiques d'un niveau inférieur, par des dispositions prises dans le cadre de la loi ? Il ne fait pas de doute que cette dernière solution assure mieux la stabilité du code de procédure.

Nous devons encore signaler brièvement la méthode du droit comparé qui constitue elle aussi un des facteurs de la médiation de l'évolution du raisonnement en droit de procédure. La méthode comparative, en effet, indique des possibilités d'application qui dépassent le domaine de l'élaboration du droit et touchent, dans certains cas, celui de l'application du droit.[58] Sous le rapport des pays socialistes, le but, la mission des institutions du droit de procédure, leur base sociale, économique et politique, sont, en effet, identiques, même si elles se trouvent, de par la force des choses, à des niveaux différents de l'évolution sociale.[59] C'est également en ce point qu'il convient de signaler — sans pour cela appartenir au camp de ceux qui reconnaissent l'existence du soi-disant droit d'administration de la justice, comme une branche autonome

[57] Parmi les codes de procédure pénale des autres pays socialistes (codes parus après 1960): la loi du 29 nov. 1961, No. 141/1961. Sb. de la République Socialiste Tchécoslovaque sur la procédure pénale des tribunaux (parue au Journal Officiel du 27 déc. 1961) compte 392 articles; le code de procédure pénale du 10 sept. 1953 (modifié par la loi du 11 mai 1967) de la République Socialiste Fédérative de Yougoslavie compte 520 articles; le code de procédure pénale du 19 avril 1969 de la République Populaire de Pologne (paru dans le No 13/1969 du Dziennik Ustaw, en date du 14 mai 1969) compte 592 articles; le code de procédure pénale de la République Démocratique Allemande du 12 nov. 1968 (paru dans le Journal Officiel No. 145—146, en date du 12 nov. 1968) compte 524 articles; parmi les républiques fédérées de l'Union Soviétique, le code de procédure pénale de la RSFSR du 21 oct. 1960 compte 413 articles. Ces textes sont donc en général plus volumineux que le décret-loi No. 8 de 1962 qui comptait 363 articles. Le nouveau code de procédure pénale hongrois (loi I de 1973) comprend 407 articles.

[58] Sur l'importance de la méthode comparative, voir les thèses introductives de SZABÓ I., présentées à la conférence sur *Les voies nouvelles de la recherche dans la science juridique* (A jogtudományi kutatás új útjai). points 15—16. ÁJ. 1971. p. 600, ainsi que du même auteur: *Az összehasonlító jog elméleti kérdései* (Questions théoriques du droit comparé). ÁJ. 1972. pp. 197 et suiv.

[59] Cf. SZABÓ: *Az összehasonlító jog* (Le droit comparé), p. 200. Pour le droit comparé «externe» (entre systèmes sociaux différents) et «interne», voir ibid. p. 204.

de droit — l'importance de la méthode comparative parmi les différentes branches de droit, qui est toujours susceptible de fournir quelque modèle que l'on peut prendre en considération lors de l'élaboration des solutions du droit de procédure.

Notons encore parmi les éléments qui transmettent l'effet des facteurs agissant sur la modification du raisonnement du droit de procédure pénale, à côté de la réglementation du droit positif, la pratique quotidienne des tribunaux, leurs décisions dans les cas d'espèce, ainsi que la direction de principe fournie aux tribunaux, une direction, qui juge à un niveau de plus haute généralité des éléments de la pratique judiciaire et se rapporte à l'élaboration des décisions d'espèce.[60] Des tendances dans une certaine mesure similaires se manifestent également dans le développement des procédures socialistes. Ainsi, p.ex., le processus de l'élaboration des décisions des autorités compétentes touchant le rassemblement, l'administration et l'appréciation des preuves, ne nécessite pas nécessairement sa réglementation détaillée par le code de procédure ou par quelqu'autre norme juridique d'un niveau inférieur. Nous reconnaissons aujourd'hui de plus en plus l'importance des directives de principe et des prises de position élaborées par les tribunaux supérieurs, et qui résument de façon exhaustive — sur la base des données empruntées aux jugements d'espèce —, quelquefois dans des questions de détail, mais aussi sous des aspects plus généraux, les points de vue actuellement valables dans l'élaboration des jugements et qui donnent une orientation dans la phase donnée de l'évolution sociale à la juridiction pénale.[61]

Un autre facteur enfin qui joue également dans la médiation du développement du raisonnement du droit de procédure pénale, et qui agit par là sur le raisonnement de la pratique judiciaire pénale, c'est que les gouvernements

[60] La loi hongroise No. IV de 1972 indique en particulier, dans son Art. 46, al. 2, point a), que pour l'élaboration des principes de son activité de direction de principe, la Cour Suprême utilise les expériences recueillies au cours de l'appréciation des jugements, des notifications et des plaintes, ainsi que les informations provenant directement de la pratique judiciaire.

[61] Nous ne pouvons nous référer à ce propos, dans la pratique hongroise, qu'à la Note d'information sur la rédaction des jugements pénaux, publiée dans le numéro spécial de l'Igazságügyi Közlöny (Bulletin du Ministère de la Justice) en date du 25 janvier 1963, donc de caractère administratif. Par contre certaines directives de la Cour Suprême (p. ex. la directive No. 4 et No. 6) sont très importantes et reflètent le développement du raisonnement en droit de procédure. En URSS, la décision prise en séance plénière par la Cour Suprême de l'URSS en date du 28 juillet 1950, a joué un rôle de premier plan dans la direction de principe de la juridiction pénale. Cette décision a pris p. ex. position, entre autres, en l'absence de dispositions du droit positif, en des questions aussi importantes que la nécessité de la motivation du jugement pénal. La décision du 30 juin 1969 de la séance plénière de la Cour Suprême de l'URSS (voir BVS SSSR No. 4 de 1969), qui a succédé à la précédente, reflète bien l'évolution du raisonnement procédural et fournit aux tribunaux des directives utiles dans de nombreux problèmes d'importance. Pour les points de vue les plus importants des activités déployées en ce sens par la Cour de Cassation française (entre autres, pour la rigueur et l'exactitude nécessaires dans la formulation des directives et la souplesse permettant l'application aux cas nouveaux), voir GORPHE, E.: *Les décisions de la justice*. Paris, Sirey, 1952. p. 59.

et d'autres organismes chargés de la direction de principe des activités de la justice, élaborent de temps à autre, dans l'intention de fournir une orientation d'ensemble, des directives touchant la politique pénale.[62] Cette activité prouve clairement que dans le développement social des pays socialistes on reconnaît de plus en plus nettement et impérieusement la nécessité de la régulation des processus sociaux, de la direction consciente et plus scientifique de la société, y compris les connexions de celles-ci avec leur réalisation dans la pratique juridique, et les tâches qui incombent de ce fait aux organismes de direction.[63]

D'après ce que nous venons d'exposer, le développement du droit pénal matériel fondé sur la recherche de l'essence et des causes véritables de la criminalité, l'élaboration d'une conception nouvelle du système pénitentiaire, et la solution des tâches de la prévention constituent les points nodaux les plus importants à propos desquels se présentent des modifications essentielles dans le développement du raisonnement procédural. Il faut y ajouter encore le fait que l'utilisation des résultats d'autres disciplines scientifiques dans la découverte, la preuve et l'appréciation des faits relevants dans l'affaire criminelle, constitue également un des éléments importants du développement du raisonnement en procédure pénale.

Cet aperçu des facteurs les plus importants agissant sur l'évolution du raisonnement du droit de procédure pénale n'a pu naturellement donner qu'une image approximative des changements en cours dans le raisonnement procédural.[64] Il indique cependant qu'il apparaît de plus en plus clairement, dans le développement du droit de procédure aussi, que l'examen purement juridique, fondé sur une conception simplement dogmatique et normative des institutions juridiques, en matière de procédure ne saurait satisfaire dans ce domaine non plus. On ne saurait se passer, bien sûr, sous aucun rapport, de l'approche juridique des institutions juridiques de la procédure. Elle indique en effet ce que doivent être les normes du droit positif, comment elles doivent

[62] Pour les problèmes de la politique pénale de l'Etat, voir dans la littérature hongroise: HORVÁTH, T.: *A szocialista állam büntetőpolitikájának alkotó tényezői* (Facteurs composants de la politique pénale de l'Etat socialiste). ÁJI. Értesítő. 1960. pp. 403—432, et récemment, après l'élaboration des directives de la politique pénale en 1964, FONYÓ, A.: *Büntetőpolitika és állam- és jogtudomány* (La politique pénale et les sciences politiques et juridiques). ÁJ. 1964. pp. 44—50. Voir également le résumé de FÖLDVÁRI, J.: *A büntetés tana* (La doctrine de la peine). Budapest, Közgazd. Kiadó. 1970. pp. 214 et suiv.

[63] Voir à ce propos LEHMANN, G.: *Wissenschaftliche Leitung der Strafrechtsprechung.* Berlin, Staatsverlag, 1968. p. 270.

[64] L'étude et l'analyse intermittante des tendances de l'évolution apparaissant dans le droit de procédure constituent la tâche de la science de la procédure. Il n'existe pas en Hongrie de travaux monographiques autonomes sur l'histoire du raisonnement en matière de droit de procédure. Dans la littérature soviétique, l'ouvrage de Полянский, Н. Н.: *Очерк развития советской науки уголовного процесса* (Esquisse du développement de la science de la procédure pénale soviétique). Moscou, Ed. de l'Académie des Sciences de l'URSS. 1960. 211 p. — donne un aperçu des développements qui ont précédé les codifications de 1960.

se réaliser au cours de leur application dans le façonnement et l'ordonnancement des rapports sociaux. Mais justement la présence et la manifestation de ces multiples facteurs, qui influencent le raisonnement du droit de procédure pénale et cherchent à s'affirmer dans les solutions du droit de procédure, indiquent qu'on ne peut non plus pas laisser hors de compte les résultats passés au crible de la critique de la recherche des aspects extérieurs aux normes, qui représentent en fait le fondement, le contenu même des institutions du droit. Les résultats de la recherche scientifique contribuent dans une mesure très importante à ce que les facteurs qui déterminent le développement de la société et agissent également sur l'élaboration du raisonnement du droit de procédure, s'affirment dans la pratique de la procédure pénale aussi, dans les jugements d'espèce des tribunaux.[65] Le droit positif lui-même n'ordonne pas, ou plus exactement, n'ordonne souvent pas encore ces résultats; les connexions qui apparaissent dans le processus du raisonnement. La pratique de l'application du droit, par contre, qui se trouve en contact permanent avec la vie quotidienne, ne peut se permettre de les laisser hors du compte, sous peine de s'isoler et de se couper de l'évolution de la vie réelle.

Factors moulding the development of criminal procedural thinking

by

L. Nagy

The scope and number of phenomena connected with human conduct to be judged in criminal proceedings, methods susceptible of their discovery and ascertaining, processes, and, in general, means aimed at reducing criminality, the development of institutions are determined by social developments and are advancing in keeping with this development. The introductory (I) part outlines the overall problems of the correlation between criminal procedural thinking and judicial practice. Criminal procedural thinking is aimed at examining, first of all, among the factors determining objective thinking, the development of substantive criminal law and penal sciences (II). It is pointed out that following from the contemporary questions of substantive law (recent concepts of crime, danger to society, conformity with the facts of the case, unlawfulness, conduct to be expected, problems of shaping the system of penalties, etc.) procedural law is constantly facing new problems particularly in the field of evidence. The principal consequence of penal sciences is that the scope of relevant facts has been considerable widening. Criminal procedural thinking is, in general, advancing from a static concept of crime to a dynamic concept: it examines crime in its movement, evolution. The paper then goes on (III) to examine the changes in criminal procedural thinking due to the opportunities of applying

[65] En Hongrie, selon les dispositions d'une règle de droit positif récente (Loi IV de 1972, Art. 46, al. 2, point d), dans l'intérêt de la direction de principe, la Cour Suprême utilise les initiatives des organisations de l'Etat et des organisations sociales, leurs informations et renseignements, ainsi que les résultats de la recherche scientifique. Selon les dispositions du C.pr.p., les autorités compétentes ont le devoir de recueillir et de fixer les preuves sur la base des expériences pratiques ainsi qu'en recourant à des méthodes scientifiques.

natural scientific knowledge — transmitted by criminalistics; then the paper surveys — taking the socially determined character of law as a point of departure — the impact of the results, conclusions of social scientific fact-finding on criminal procedural thinking (IV). This is followed by an investigation into the knowledge connected with human thinking (psychological, logical, etc.) as a factor also bearing on criminal procedural thinking (V). In the concluding (VI) part are summed up the transmissions through which changes are brought about in criminal procedural thinking (law-making, law-applying practice, law comparison, etc.).

Факторы, воздействующие на развитие уголовно-процессуальной мысли

Л. НАДЬ

Круг и число рассматриваемых в уголовном процессе явлений, связанных с человеческим поведением, методы, а также процедуры, применяемые в ходе раскрытия и установления этих явлений, и вообще средства и институты, направленные на предупреждение и предоление преступности, в ходе развития общества и во взаимосвязи с этим развитием по необходимости развиваются дальше. Вводная (I) часть излагает наиболее общие проблемы взаимосвязи между процессуально-правовой мыслью и практикой правосудия. Из факторов, определяющих развитие объективной мысли — процессуально-правового мышления, исследует в первую очередь развитие материального уголовного права и наук уголовного права (II.). Отмечает, что актуальные вопросы материального уголовного права (новые, концепции понятия преступления, вопросы, связанные с общественной опасностью, взаимосвязь соответствия составу, противоправности и психического содержения виновности, проблемы формирования системы наказаний и т. д.) и в процессуальном праве ставят все новые и новые проблемы, в первую очередь в области доказывания. Наиболее важным последствием достижений наук уголовного права является значительное расширение круга факторов, значимых в рассмотрении уголовных дел. Процессуально-правовая мысль развивается, как правило, от статического подхода к преступлению в направлении кинетического, динамического подхода: исследует преступление в движении, в развертывании. В дальнейшем статья излагает (III) изменения процессуально-правовой мысли, имевшие место вследствие возможностей применения естественно-научных знаний, опосредствованных наукой криминалистики, а затем — исходя из общественной обусловленности права — обозревает влияние результатов, установок социологических исследований фактов на процессуально-правовую мысль (IV). Далее следует обозрение развития знаний, связанных с процессом человеческого мышления (в области психология, логики и т. д.) (V). В заключительной (VI) части подытоживаются посредники изменений, происходящих в мышлении (правотворчество, практика применения права, роль сравнения правовых систем и т. д.).

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The International Cartels and Monopolies in the Law with Special Regard to the European Economic Integration*

by

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§ 1. To the subject-matter

1. There are cartels and enterprise associations exploiting their power position, i.e. monopolies, whose participants are, partly or wholly, not enterprises of the member states of the Common Market, still may have, and even have, an influence on the economy of other than their own countries, so on that of Europe and the Common Market too; these are, accordingly, cartels and monopolies which the Common-Market anti-trust law, at least in the first approach does not apply to.

We firmly believe both the topic and its study will help us to a better understanding of the phenomenon and its appraisal by the West, and so also to its critical valuation. Secondly, we shall have an idea of how Hungarian enter-

* The present writing is but part of a larger volume by the same author, dealing with the legal mechanism of the European economic integration (the Common Market), and analyzing, with particular stress, the expanded, so-called European framework of economic law of the enterprises and the movements of capital. Therefore in the present study at several places references will be made to the ready for print parts [partly published: parts; see in the List of Sources under Mádl (3), Mádl (5), Mádl (6)] of this work. This applies in particular to the general theoretical critique of the law of international cartels and monopolies in the first part of the work, to which the present study can, beyond mentioning of several new writings in this field, merely refer.

prises should proceed, or what they should avoid, in the formulation of their contracts of co-operation or joint ventures — of which there is already a fair number in operation[1] — in order to achieve their goals possibly without interference from the Common Market or other authorities.

2. The cartel and the economic association or monopoly abusing their dominant position are theoretically and practically phenomena intertwined also within the Common Market. Both law and jurisprudence are looking for the solution of the problem in the interrelation of §§. 85 and 86 of the Rome Treaty.[2] This is the case in particular in international relations, i.e. in the case of international cartels and monopolies. Certainly international cartels and enterprise associations striving for a dominant position cannot be kept apart by a clear-cut line either economically or legally. In reality a dominant position will be held also by a co-operation not organized, in the meaning of company law, to a company or to a corporation, a co-operation by loose contracts which by this and other means is capable of the formation of a uniform will and by this capable of bringing about uni-centrally controlled market operations in certain sections of world economy. Even critical professional writers state[3] that economic competition has not to be looked at from an either-or approach. In fact from the point of view of possible legal measures the phenomenon will find itself at a place sheltered from the wind: either it takes refuge in the form of a cartel, when the practice as regards power position is the more rigorous, or take on the form of a concentration of enterprises, if the form of cartel happens to be the less convenient. Therefore the honest champions of fair competition are intent on having the arsenal of anti-trust law, i.e. institutions limiting cartels and monopolies shaped in complex interrelation and so applied to the concrete phenomenon here discussed.

§ 2. The subject-matter—demonstrated by examples and facts

(a) *An example case: the International Quinine Cartel*

3. The example, which betrays much of the operating mechanism of the international cartels and also how the legal mechanism of modern capitalist states responds to cartel operations, is offered by the International Quinine

[1] See the study of Sólyom-Vörös (pp. 642 et seq.) on the contracts of Hungarian enterprises for international co-operation. The study, too, indicates that, first, the number of East–West contracts for co-operation is considerable and tends to increase, secondly, these contracts may in point of principle affect the law governing competition in the foreign countries concerned. Western statements, too, seem to be aware of the importance of the large number of contracts signed with Hungarian enterprises; since 1968 about 360 such contracts have been signed. (See "*Kontakte mit dem Westen*". Spiegel, No. 46, November 6, 1972, pp. 143 et seq.)

[2] See Mádl (3) paragraphs 81 et seq.

[3] Ibid., paragraphs 81 et seq.

Cartel. In the following we shall discuss the story of this cartel. For several reasons it is worth-while to speak of the facts of the case in detail. First, because it is one of the in the "technical" sense legal cases dealt with in court demonstrating how the anti-trust law of the Common Market prevails in interrelations beyond the Common Market. Therefore the study of this typical case comes, if only for reason of an analysis of dogmatics of law, within the province of the present subject. Among others on hand of this example we may establish how far the Common Market has advanced in the sphere of legal means, and how it is advancing. Secondly, this case makes it clear how under capitalist conditions the public law element permeates exactly the world of anti-trust law. This is borne out by the circumstance that in certain cases the supreme organs of the states had to deal with the problem, often also with unique cases. Meanwhile also in cases of private cartels political and international organs are mobilized, i.e. one has recourse to means of constitutional as well as international law and to the assistance of certain institutions, diplomatic pressure and so on. Even so these organs and institutions will be hard put to it when it comes to join issue with the large international oligopolistic concerns and their cartels. Thirdly, it is worth-while to deal with the case of the International Quinine Cartel more closely also because on hand of this case we shall be able to demonstrate of what co-ordinated action on world-scale capital is capable through the cartels and how governmental measures cut to the free-market pattern of capitalism will in the majority of cases force the giant monopolies to a temporary withdrawal only.

As a matter of fact speaking of the facts about the International Quinine Cartel we shall have to go back to about half a century ago. At that time in point of fact the predecessor of the International Quinine Cartel of today, in *U.S. v. N.V. Amsterdamsche* the US District Court for Southern New York already as early as 1928 brought a charge against the concern and issued an injunction prohibiting the conspirative cartel practice also under anti-trust law.[4] On August 15, 1958, however, the American Quinine Company, which did not participate in the International Quinine Cartel of recent date, lodged a complaint, perhaps because it had been thrust out from the cartel, with the US Government: "Apparently the Quinine Monopoly won't stay dead. For years the US Government fought a losing battle against it and even had our world war effort hampered by it only a few years ago. Now an agency of the government is about to put it back in business." As a matter of fact the US Government availing itself of the situation created by the practice of the International Quinine Cartel, which at that time sold quinine to those in need for it (as is known quinine is the elementary substance of a number of medicines, also of such prescribed for cardiac troubles), swamped the market with large quantities

[4] The judgements are published by FULDA-SCHWARTZ pp. 91 et seq.

of quinine from state quinine reserves. What the US Government had in mind was to bring down the market price of quinine and with the means of capitalist economic competition to create a market where demand could be met in a way as if there were no efficiently co-ordinated monopoly operating in the international market. Still this was a step which in fact served the interests of the International Quinine Cartel: "If the past is any guide to the future, it is easy to learn what will happen", wrote the general manager of the American Quinine Company, the company outside the Cartel, in his report to the Government, and continued: "the cartel will buy the quinine at a low price from the General Services Administration. This will remove the only barrier to the operation of the monopoly, because it cannot operate with a large supply hanging over the market. The price of quinine to the American buyers will immediately be raised. The millions of poor people in the tropics will again have to pay tribute to the monopoly and many of them will again be condemned to death because they cannot pay."[5] In reality, however, the International Quinine Cartel did not find itself in a situation more precarious than the one before. Moreover, it was due to the Government measure that the Cartel earned an exceptionally large and exceptionally easily get-at-able extra profit. As a matter of fact the Cartel bought quinine at a low price, notably the quinine put by the US Government on the market, and then sold it at a tenfold price immediately (as a matter of fact this was the difference between the old and new cartel prices). In an easy way the Cartel earned an enormous profit, which otherwise it would have had to earn through transactions between producer and consumer, i. e. in a way implying more and greater complexities. By this means the International Quinine Cartel could have been forced to a retreat only if the American Government had put on the market quinine in quantities the Cartel could not have bought up, among others for the reason that for a long time it would not have met an adequate demand. This was not, however, the case. Before all because the International Quinine Cartel had control of the international quinine production and sales to an extent that by the side of the Cartel's turnover the American stocks counted so to say for nothing, even if we ignore the fact that as it turned out these stocks were fairly large ones. Still these were partly government reserves which the Government could not dispose for wholesale as the depletion of these stocks would have constituted a defence risk. The Government would not, of course, accept the responsibility for such an act. Instead at the storm of indignation[6] of the country against the Cartel Congress, too,

[5] The report containing the quotation has been published by FULDA-SCHWARTZ, pp. 93—94.

[6] For the "press' of the general indignation and the storm in Congress see *US Will Probe High Prices of Quinine Cartel* (Los Angeles Times March 24, 1967); Hearing on the Prices of Quinine and Quinidine Before Subcommittee on Antitrust and Monopoly of the US Committee on the Judiciary, 89th Congress, 2nd Session (1966), published in FULDA-SCHWARTZ, pp. 89 et seq.

dealt with this "predatory" conspiracy and "exclusionary" tactics.[7] It was established that *ACF Chemiefarma N.V. Amsterdam* (or its legal predecessor *Nedchem*) had by a gentleman's agreement entered upon with a number of European (British, French, German) and a single American firm brought about a water-tight international cartel, in which activities had been brought under uniform regulation, even in matters such as the fixation of quinine prices, the distribution of export quotas, etc. This Cartel had been extended also to the territory of the Common Market. At the intervention of the American anti-trust authorities, and eventually at that of the American government the authorities of the Common Market countries began to deal with the question and initiated procedures for the liquidation of the Cartel.[8] For the developments see sections 24, 25 and 32.

(b) *The world market as organized by states — private cartels and monopolies*

4. The International Quinine Cartel is but an instructive example from life. Still it may appear to be a unique example. Many other such and similar cases may, so to say as *pars pro toto*, be quoted.[9] If, however, it is our intention to study the international cartels and monopolies also in general, then from the seemingly unique lesson derived from seemingly unique cases we shall be drifted into the fantastic and appalling world of the movements of capital and its rapacious actions, into a world where the unique cases are merely elements of the total. We have already spoken of the degree of concentration, mainly in its interrelations on the international plane, in the light of figures and statistics.[10] At present it is the manifoldness of international concentration from the point of view of the law of organizations that flashes on us, in the form as demonstrated by reality. Yet even here we can unfold the principal problems only. Not even KRONSTEIN could write of all that would be relevant in his monograph of many hundred pages *(Law of the International Cartels)*.[11] In this work on

[7] *Predatory and Exclusionary Tactics* quoted above is the title of a chapter of the work *Industrial Organization* by the well-known American economist BAIN. The epithet *predatory* appears as technical term in connection with the study of the seller's conduct. BAIN (2), pp. 327 et seq.

[8] The sources are: The 1969 Decision of the EEC Commission (FULDA-SCHWARTZ, p. 111), the article published by Los Angeles Times on March 24, 1967 and quoted above, further the abridged statement of facts of the judgement published in Europarecht, 1971, No. 1, pp. 41 et seq., as summed up by K. MARKERT.

[9] See e.g. the other larger American case with bearings on Europe: *US v. Watchmakers of Switzerland Information Center* (published by FULDA-SCHWARTZ, pp. 52 to 82). The case is that of the activities of the large international watch cartel dominating over US watch manufacture and the American home market and "terrorizing" it and of the anti-trust action directed against the cartel. Another case is that of the decision of the EEC Commission in *Continental Can Company* (published in Journal Officiel, No. L7/ January 8, 1972). This is the story of how a large American concern could be exploiting its dominant position marshal its European affiliations and eventually dictate the conditons of manufacture and sales of the various modern packing means.

[10] MÁDL (3), paragraphs 38 to 45.

[11] See KRONSTEIN in the List of Sources.

altogether twelve pages he names several hundreds of sources whose thorough study would be worth the exertion.

To concentrate on the principal interrelations of the international cartels we have to set out from the most general yet easily expressible regularities of the international movements of economy and capital. What is meant by this regularity is not only the strengthening of the organization of production and trade beyond the doors of the particular enterprises in the age of imperialism, but also the growth of this organization to almost incredible dimensions. Under socialist conditions it is quite natural that the state takes part in this beyond-enterprise organization of production and trade, in particular in their organization on an international scale. This follows as a matter of course from the principles of socialist economy and its organizational pattern. On the other hand in the "beginning" this element was missing in the ecology, and even more in the picture of classical political economy of private capital, and as soon as it turned up, capital tried to cover it up embarrassedly. As a matter of fact through state participation the theoretically unwelcome immanent regularities of the domination of capital and its form of movement came to light. Mainly regularities manifested themselves which meant the deprivation of the small enterprises of the illusion of free competition by "big business", and its replacement by the command of "exit" or accommodation. For the small ones the consolation of freedom in the meaning of ENGELS remained, viz. they became aware of that their freedom consisted in the recognition of the necessity of accommodation. The international organization of production and trade in a certain form may for that matter be considered an institution dating back to two hundred years ago. In this form of organization enterprises operating on an international scale, through organizations within the enterprises themselves, embarked on organizational activities in economy the world over. However, what is decisively the product of this century, and on the present scale, of the latter decade or two, is something altogether different. What is meant here is the organization of production and trade on an international scale in a more and more general form, on the one part, and on the other, the effectuation of all this through building up a system of contracts of great complexity of enterprises and monopolies operating in the various countries of the world.

The study of the causes here touched upon, and also of other causes, comes already within the province of theoretical economy. One of the principal factors, at the same time the most general catalyzer and cause, is in all events the intensity and speed of scientific and technological development, by the side of which the industrial revolution of the 19th century dwindles almost to insignificance. Through the mediation of the given production relations the international cartels are the organizational and legal manifestations of this development.

5. Even under capitalist conditions among the organizational and legal forms the direct organizational functions of the state of economy and market are significant. There are several forms of this direct interference of the state. These forms partly reinforce the organization of world economy by capital "on a private basis", partly impose limitations on this function of the capital. Interrelations, however, exist anyhow between state and capital, and the two in their interdependence jointly bring about the organizational and legal mechanism of the organization of processes in world economy. Still in the following we shall have to refrain from enlarging on the study of these problems.[12]

6. Whereas the international state cartels are more known and are in fact of a general effect, general in the sense even, that often they melt away in the mist of generality, as for efficiency the international economic processes are in reality controlled by the private cartels, the *private Marktregelung*.

These are not even cartels in the traditional acceptation of the term anymore (originally cartels were defined as the formal contracts of segregated subjects-at-law, reinforced by sanctions, decreeing the settlement of disputes by arbitration, when the makers of the contracts guarded against the violation of the prohibitive provisions of municipal cartel laws). Cartels of this type have to some extent survived. Still on a number of considerations, so for reason of stronger supervision and the prohibition of the formation of cartels, such formal contracts are made on rare occasions only. Oligopolistic attitude in the market, i.e. the in respect to one another co-ordinated and so concentrated attitude of large enterprises operating on an international scale, comes into being within the motley-coloured multitude of the organizational and legal forms and before all tenuous fabric of these forms. The forms extend from the tacit insistence on the definite practice of the other party, through price fixing agreements and such on territorial distribution, through purchase and sales pools, development co-operation and through a number of other modes down to the control of affiliated companies and vertical organizations of entirely loose forms operating under company law. It is beyond our ken therefore to offer a clear-cut definition of this organizational pattern. The most comprehensive definition is formed of the totality of the following elements: what they constitute is (1) the co-ordinated economic attitude (2) of enterprises (in general large enterprises) having their seats in different states (or jurisdictional units such as the EEC), relying on an agreement reached in the one form or the other, and (3) leading to the international control of (4) world market processes.[13]

[12] See in general KRONSTEIN, pp. 10 et seq.

[13] This resolved definition of the notion of the cartel is perhaps closest to Kronstein's accurate, yet technically formulated definition: Ein Kartell ist die auf Einverständnis selbständiger Partner beruhende Gleichrichtung in deren wirtschaftlichen Verhalten, die eine Regelung eines oder mehrerer Märkte zur Folge hat (KRONSTEIN, p. 31).

The principal groups of international private cartels are (for details the respective literature should be consulted[14]): (a) technological cartels; (b) raw or prima material cartels; (c) cartels concerning industrial products; (d) protective cartels and (e) the complex cartels embracing the elements of practically all types of cartels.

The reality of capitalist wrestling in the world market serves as an "aid" for the delineation of the type of cartel mentioned last, which it is best to call a complex cartel, or even an anti-cartel, if a name should be given to it at all. The latter name appears to be the most appropriate in an association of ideas, namely in association with the so-called anti-matter which is a more powerful energy-carrier than ordinary matters. As a matter of fact this complex cartel is a more powerful controlling factor of the market than the cartel proper: historically the complex cartel has grown out of the cartel proper, it has become the carrier of anti-forces through the legal seclusion of the company; it preserves its cartel wrapper, for cartel agreements provide the external substance of the nucleus. The cartel then preserves these agreements unchanged, or even enriched. In other words here we have the case of the combination of the monopoly, viz. the dominant position organized under company law and market organization by way of cartel agreements.

In the analysis of legal actions instituted against cartels and monopolies qualified as noxious among the facts about the complex cartels we shall find two international economic conspiracies which may serve as examples for the present discussion. Both, the complex cartels of *Timken* and *Continental Can* were American and European at the time in so far as the two cartels fettered the European market, too, moreover with their influence they affected the foreign trade even of the socialist countries. Both the *American Timken*, and in like way *American Continental Can* in their specific branches of industry (respectively roller bearings and metal and synthetic resin packing materials) in the first step through a tangle of licence agreements and other agreements for co-operation exerted excessive pressure on the European markets of the respective industries. In the second stage, through associations and purchases the two cartels acquired a homogeneous controlling position under company law directly, and through a summit organization, what was called holding formed in Europe. By this action the two cartels automatically eliminated competition in the larger part of the respective branches of industry. In the third stage the two cartels, from a reinforced position, by further tightening the pressure, could, to the prejudice of earlier competitors too, bring about cartel agreements (co-operation in the form of licences, territorial distribution, co-ordination of prices, development, etc.)

[14] See KRONSTEIN, pp. 68 et seq.; NEALE pp. 300 et seq.; OPPENHEIM, pp. 755 et seq.; AREEDA, pp. 318 et seq.

(c) *International economic associations*

7. A large number of works, books, monographs, papers, etc. deal with the history, type, economic and political role of international economic associations.[15] In the following we shall discuss the interrelations through which the international economic associations act even on the organization of the market, and although they are not cartels nevertheless have a share in the non-governmental moulding of the economic processes of world economy, and in particular of those of the European Economic Community.

The role of these associations is essentially a dual one. First, it is a directly economic one, in so far as the associations co-operate in the rationalization of the economic activities of the participating members, organize market survey, publicity, jointly with the other members through the association, collect information jointly with the others, and jointly exploit such information. Secondly, the associations display activities essentially of the nature of economic policy. In this sense the associations try to influence the economic policy of the governments in so far as this affects their activities, or to control the development of the policy of large international or supranational organizations, in particular their economic policy. In reality their principal function is to safeguard the interests, or, as expressed in a studied form in literature, the "power-accentuated self-interest" *(machtbetontes Eigeninteresse)* of the participating large concerns, the oligarchic members representing a well organized power, against the interventionist economic policy of the modern capitalist state.[16]

In home politics these associations act a part as pressure groups or lobbies and often force the governments to a retreat in their economic measures. Here the associations partly have recourse to a variety of economic as well as political pressure, partly make use of the internal personal contacts. By personal contacts in the present connection certain personal interrelations are to be understood between the leading personalities of the industry or the economy and the principal figures of political life. This intertwining of interests assume proportions that in Western literature many write of the metamorphosis of the political system owing to the activities of the economic associations.[17] There are some who in truly apologetic words depict the situation with yet "darker" colours. They say among others if the modern bourgeois state is unable to defend itself against the pressure of economic powers (these powers include in the number of pressure groups also the trade-unions), and is unable to stem this process, then eventually we shall have to face the birth of the total-

[15] For details see RYFFEL, pp. 159 et seq., BEATUS, pp. 2 et seq.; IPSEN, p. 375. It is characteristic of the dimensions and differentiated development that today even international economic federations have their federations (for this see the interesting treatise of MEYNAUD in the List of Sources).

[16] The rather subtle formulation speaks of the *machtbetontes Eigeninteresse* of the members of the federation (RYFFEL, p. 161).

[17] *Umwälzung im Staatsgefüge durch die Verbände*, writes HUBER, p. 190.

itarian state. Notably as a counter-trend the strengthening of the central sovereign power, would, as they write, threaten the what are called great democracies with the peril of death.[18]

8. The economic associations have understood to create a home for themselves legally even in the international arena. If in a more or less generalized form, even the Charter of the *United Nations Organization* receives these associations within the constitutional pale, in so far as in Article 71 it has been decreed that the Economic and Social Council may institute any appropriate measure in order to consult with such non-intergovernmental agencies as deal with matters coming within the competence of the Council. The Charter in this sense does not merely presuppose the existence of international economic association, but presupposes their operation, too, in a positive sense: it expects these associations to accept an active role in the settlement of international economic problems.

What is of even greater moment is the provision of the *Rome Treaty* on the composition of the Economic and Social Committee when it declares that in it the various groups of economic and social life should take part, or, in another formulation at another place, it provides that in the Economic and Social Committee an appropriate representation must be guaranteed for the various social and economic groups. The Rome Treaty goes even further in so far as it declares that the Council of Ministers may as regards the composition of the Economic and Social Committee consult with the representatives of the European economic associations, or any other associations, with the representatives of any European association which through its activities affects the operations of the EEC.[19] Accordingly in the Economic and Social Committee the principal officers of the national and European capitalist industrial and commercial organizations are in general present. This is what literature, too, states.[20]

The same policy, moreover in an even more differentiated form, the yet greater respect paid to the interests of the economic associations, their increased initiation into decision-making on governmental and even supranational level find expression in the *Montanunion Treaty*.[21]

In this historical and legal situation the Common Market will be hard put to it when it decides to take action against the international cartels of industry, or against their other noxious market controlling acts. This is but the

[18] This process »könnte für die Großdemokratien — Glücksfälle abgerechnet — todbringend sein« writes RYFFEL, p. 1968.

[19] *Rome Treaty*, Articles 193 and 195.

[20] IPSEN, p. 377.

[21] *Treaty of the European Coal and Steel Community*, Articles 46, 48, 58, 61. The Common Market pressure groups have by today developed to dimensions giving incentive to a large theoretical literature on economy and politics (See MEYNAUD in the List of Sources).

reflection of the contradiction implied in the circumstance that the modern capitalist state on professing the principle of market economy relying on the freedom of competition takes action for the institutionalized safeguard of competition by the law of competition, on the one part, and on the other, it recognizes the extra-enterprisal organization of capital within a wide sphere, moreover raises this recognition to international level. Even if the international economic associations are not directed expressly against the restriction of economic competition, still these associations are the means for shaping the economic policy of the state with due regard to their interests, and for influencing this policy accordingly. This will not be mitigated even by euphonious theoretical reasonings according to which the modern state has ceased to be the sole holder of the sovereign power; the framework of this sovereign power embraces all political organs and groups, so that the modern state has become some sort of a "co-operative co-operation", a development which eventually will lend some sort of a new mode of life to bourgeois democracy.[22]

§ 3. The reply of the law to the challenge (from the genesis to international law)

(a) *In general*

9. The cartels and the monopolies have appeared on the scene, they have grown and also the right to put up resistance against them has been born. We have seen how this resistance has been born and how efficient it is.[23] We have also seen how the international monopolies and international cartels have come into being and with what legal differentiation. The law in all cases follows the development of the economic and market conditions, even when with an unveiling or distorting, or even retrograde character. In the same way as cartellization as economic phenomenon has seceded from the national framework, so also the idea of internal legal defence wants to leave the national confines, in order to get hold of the international cartels and monopolies where they are most active irrespective of where they have their statutory domicile. However, in this connection theory and practice have stumbled upon a number of general theoretical, fundamental and practical problems. When now the achievements of literature and practice are reviewed[24] the essence of these problems may be summed up as follows:

[22] RYFFEL, pp. 184—185.

[23] See MÁDL (3) paragraphs 63 et seq.

[24] See HOMBURGER—JENNY, pp. 51 et seq.; MEESSEN, pp. 560 et seq., FRISINGER, pp. 553 et seq.; KRONSTEIN, pp. 501 et seq.; NEALE, pp. 342 et seq. These sources inform also of the development of court practice. Practice will be discussed in this study subsequently at its proper place.

(a) May criminal or quasi-criminal law sanctions of the law of competition be imposed on the legal entities of foreign states for acts committed in the territory of a foreign state at home, if these sanctions originate from municipal law and are applied by the domestic authorities? The question has been raised because according to general, or rather traditional, opinion these sanctions have no extra-territorial effect, they are part and parcel of municipal law (principle of territoriality); secondly, the infliction of the sanctions for an act which at home would qualify as lawful infringes the sovereignty of the foreign state (principle of sovereignty).

(b) Is there an international cartel law at all by virtue of either legal custom or by international legislation? If there were any, in many states where the international rules accepted by the given state operate directly, this law would have priority before the municipal provisions governing the cartels. This would bring about that in the given state provisions by far more rigorous (or by far milder) than those of municipal law would have to be applied to the international cartels.[25]

(c) If there were no international cartel law at all, then the states on the plea that the international cartels and monopolies by acts performed abroad have produced noxious effects in the forum country, could qualify these acts as delicts, i.e. a cartel created abroad lawfully could owing to the effect it produced in the state in question be qualified as unlawful *(Wirkungsprinzip, principle of effects produced)*. The question is, whether this circumstance is sufficient that in order to avoid these effects the states take action against cartels and monopolies domiciled in a third state.

(d) These considerations may, however, be formulated differently. Do not the conditions of the municipal law of competition, in general the safeguard of the domestic economic order, the approved economic policy of the home state, justify by themselves the institution of legal measures by the states against external economic powers which with their actions encroach on this domestic order? This is the principle of protection *(Schutzprinzip, principe de la protection)*.

(e) The measures of the state defending its interests may cut into the quick, i.e. violate economic and even political interests of other countries; e. g. Switzerland, as a state, has made a grievance of the decision of the Supreme Court of the United States in the case of the Swiss Watch Cartel.[26] The Netherlands goverment too indicated that the measures of the United States government against the International Quinine Cartel were prejudicial to Dutch

[25] The direct enforcement of international law is the principle e.g. according to § 25. of the Grundgesetz of the Federal Republic of Germany (for details see: MEESSEN, pp. 560 et seq.).

[26] See MEESSEN, p. 561; FULDA—SCHWARTZ, p. 73.

economic interests.[27] Still even if there are no economic interests of this order of magnitude in the background of every case, some sort of a microstructural capitalist economic interest will in all cases loom up behind the defence put up, or reluctance shown, by the passively affected party. Only two examples will be given. Certain Japanese and European export companies of the steel industry, and in the last resort the steel producing enterprises themselves, wanted to reinforce their position in the face of the largest concerns, before all the large American steel producing enterprises. To this end they negotiated a cartel agreement in which a clause was taken up decreeing the coordination of exports. By itself this would not have amounted to a problem. However, by this measure the parties to the agreement could influence the American steel price level, so that the American concerns affected and represented by the *Consumers' Union*, brought an action against the Japanese and European firms (the case is still pending in the Washington District Court).[28] Often the state concerned will not act as state on either side, still it cannot be argued that on the passive side serious economic interests will be jeopardized. Also it remains a fact that the suppression of the cartel might on the other side impair the opportunities of the European and Japanese firms, and also their competitive position, in their by no means easy struggle against the American firms. The other example is associated with the merger of the firms *Ciba* and *Geigy*, Basel. Each firm had an affiliated company in the United States, which were competing with each other even there. When, however, the two firms were amalgamated into a single concern in their native country, their affiliations in the United States had as a matter of course been placed under joint management, and their competition in the United States market came to an end automatically, at a single stroke. However, by this the affiliation exposed itself to legal procedure under American anti-trust legislation. Procedure was even instituted and in this procedure the court wanted to force the parent company to sell one of its affiliations in the United States in order that competition in the given extremely important product might continue in the US market.[29]

This is at the bottom of all: an efficacious international anti-cartel practice might affect serious business interests. Strictly speaking the case is a form of the struggle against international capital fraught with complexities and contradictions, a struggle in whose "rational" development the states ac-

[27] See section 3 above; similarly the decision of the EEC Commission in *Farbstoffe* provoked a formal note of protest of the British Government (see sections 33—34 below). The note of protest is published in the Report of the 54/1970 Conference of ILA (*Aide mémoire*, pp. 185—186).

[28] Published by MEESSEN, p. 560.

[29] For comments on the American judgement see *US v. Ciba Corp.*, 1970. Trade Cases §. 73. 269 (S.D.N.Y.); Neue Zürcher Zeitung, Febr. 26, 1970. p. 13; MEESSEN, ;. 561. For the concrete settlement of the dispute a branch of production of importance for competition has been allocated from the one American affiliation to an independent third enterprise.

tively and passively affected are all the same equally interested in the final balance. However, the safeguard of national economic interests and their expansion, on the one part, and the fear of the economic and political forces of capital and manoeuvring against these forces present the mechanism of this struggle, notably international anti-trust law and its practice, which as we shall see are existent, in different and divergent forms in the particular capitalist countries.

There are many who in literature with catchwords territorialism and sovereignty, or with the principles of their own, champion the freedom of movement of the enterprises.[30] On the other hand there are some who with the determination and faith of a missionary take arms for the safeguard of national interests and those of the consumers in the belief that with the aid of international anti-trust law the fairness of international economic relations can be preserved also against the international monopolies and cartels.[31]

10. How far did this "anti-trust law party" front get against the forces of the "freedom party"? Again instead of the further analysis of the many theories we shall give attention to reality: how did the theories and doctrines of the "partisans of law" hold their own? Are these theories and doctrines more than superficially acting anti-trust tranquillizers, as often asked wittily by critics?[32] We shall try to answer these questions further below.

(b) *The genesis*

11. For the genesis of anti-trust law as a branch of the municipal legal system, and as indicated by reality, so also of international anti-trust law, we shall have to retrace our steps to the anti-trust legislation of the United States of America.

As anti-trust law of today tells us in its reminiscences: the beginning of all was this particular Sherman Act of 1890. The act has in the meantime been confirmed, supplemented and extended to further areas and forms of safeguard on several occasions.[33] The first and second sections of the Sherman Act have

[30] To this refers MEESSEN, p. 561. For details see, however, the sharp dispute in ILA, where the retrograte "freedom party" men dominated by flying the banner of territoriality and sovereignty against those advocating some sort of barriers (1964 ILA Report, p. 51; 1964 ILA Report, pp. 304 et seq. *Extra-Territorial Application of Restrictive Trade Legislation*).

[31] The disputes in the ILA conferences came to an end in the 1972 Conference with the complete victory substantially of this approach, viz. the *Schutzprinzip* or *Wirkungsprinzip*. Although in the earlier conferences a trend opposing this approach prevailed, (for details see MEESSEN, p. 562), already in the 1970 ILA Conference there were indications of a change of the trend (See the 1970 ILA Report, pp. 151 et seq.).

[32] See HAIGHT, L.: *The Restrictive Business Practices Clause in US Treaties: An Anti-trust Tranquillizer for International Trade.* Yale Law Journal, Vol. 70 (1960), pp. 240 et seq.

[33] An act of this kind is the *Wilson Tariff Act of 1894*, the *Clayton Act of 1914* (provisions of importance prohibiting restrictive practices are §. 2 on price discrimination and price fixing, §. 3 on agreements restricting the freedom of contract, §. 7 on buying up competitors, §. 8 on intertwining of boards of directors), the *Webb-Promenance Act of 1918*. For details see NEALE, pp. 1 et seq.; FULDA—SCHWARTZ, pp. 17, 155.

since produced a literature amounting to libraries and also a mass of judicial decisions. These first and second sections contain the following essential elements: Any contract, or any associations of a legal nature, or conspiracy, which restricts the economic relations among the states of the Union, or those existing between the United States and other countries, are forbidden. Any monopoly or endeavours for monopolies, or any economic or legal co-operation which, by way of monopolization are apt to restrict economic relations among the states of the United States of America, or the economic relations existing between the United States and foreign states, are forbidden and any contravention of this prohibition entails the sanctions sepcified by the Act. The sanctions imply the voidance of the contracts in question or any other agreements, the payment of fines, and even imprisonment.[34]

What was questioned was, whether the ideas of economic policy as formulated by the Act had been intended to apply also to international economic relations, and what other effects the legislator had in mind beyond the wording of the Act, or in other words, in what meaning and with what efficacity has economic and social evolution covered the path of the ideas of economic policy as embodied by the Act. Referred to theoretical considerations we may formulate the question as follows: How did reality respond to the questions of principle and theory as set above? Or more explicitly, to what monopolies and cartel did the legislator intend to extend the operation of the Act? to such only as interfered with the freedom of competition in the international economic relations of the United States from their seat in the States, or to such as had on the subjective side, i.e. on the side of the participants put on the form of international cartels and monopolies, because by the side of the American members there were also aliens in them, moreover to such as on the subjective side were wholly or predominantly foreign international monopolies and cartels. If this had been the case, this would have meant as if these monopolies and cartels had been subjected to the operation of American anti-cartel and anti-monopoly legislation solely because the effects of their activities had violated and even jeopardized the anti-trust-like American domestic and international relations. Instead of enlarging on the literature of the law and history of anti-trust legislation we would merely quote the facts about it.[35] With any momentous weight these facts manifested themselves in court practice only after World War II. In the following we shall enumerate some of the prominent cases: the judgements passed in the *Alkali export* case, in 1949, in the *Timken* case, in 1951, in the *National Lead* case in 1947, in the *International Quinine Cartel* case in 1966, in the *Alcoa* case in 1942 and then later in 1964, in the *Swiss Watch Cartel* case in 1962, and in the *Ciba* case, in 1970. The sum

[34] Published by NEALE, p. 3 and FULDA—SCHWARTZ, p. 17.

[35] See FULDA—SCHWARTZ, pp. 17 et seq.; BUXBAUM (1) pp. 517 et seq.; NEALE, pp. 342 et seq.

total of these judgements are an indication of what actual form anti-trust legislation has taken on in economic and legal policy, and what force does it represent. The essence of this form and force — on the ground of cases analyzed[36] whereas the details are covered by the literature concerned[37] — may be formulated as follows: American law applies anti-trust provisions also with extraterritorial effect, if the foreign cartel or monopoly in question distorts or interferes with, the domestic or foreign economic competition in the United States, i.e. it fixes the prices, or affects the American price situation prejudicially by other means, restricts production, interferes with supply, provided, what is of importance, it does this in dimensions and size substantial enough to affect American dimensions and size in the particular industry.

(c) *What does public international law say?*

12. By waiving the study of the international anti-trust law of the other capitalist countries of importance (this we shall undertake in connection with the analysis of the international anti-trust law of the EEC, §. 4), we propose to concentrate in the following on public international law, or more precisely, on the question, how far did international public law get through interstate relations against the noxious or dangerous actions of international cartels and monopolies. It is a matter of common knowledge that the premiss of the question is the plea often put in by the monopolies concerned, that the municipal anti-trust laws of the states have no extraterritorial effect, hence for want of an international anti-trust law formulated under public international law, strictly speaking an international anti-trust law, is non-existent. Consequently if international monopolies and cartels had to be attacked with efficient and non-arguable weapons of the law, first those concerned would have to come to an agreement under public international law. This legal mechanism has received the support of theory from many sides, a number of initiatives have come to a variety of conclusions, even if these initiatives did not set out from the above premisses. The motive force of initiative on international grounds was, at least on the part of the majority of the representatives of the discipline strictly speaking the opinion that by this way at least a more efficient system of defence and regulation may be brought about.

[36] *US. v. US Alkali Export Associations*, S.D.N.Y. 1949, published by NEALE, pp. 343 et seq., *US v. Timken Roller Bearing Co.*, S.C. 1951, published by NEALE, pp. 346 et seq.; *US v. National Lead Co.* S.C. 1947, published by NEALE, pp. 351 et seq. *US v. Aluminium Co. of America*, S.C. 1964, published by NEALE, pp. 360 et seq.; *US v. Watchmakers of Switzerland Information Center, Inc.*, S.D.N.Y. 1962, S.D.N.Y. 1965, published by FULDA—SCHWARTZ, pp. 52 et seq. *US v. N.V. Nederlandsche Combinate Voor Chemische Industrie et al.*, S.D.N.Y. 1968, published by FULDA—SCHWARTZ, pp. 97 et seq.; *US v. Ciba Corp.*, S.D.N.Y. Trade Cases §§ 73, 269. See also MEESSEN, pp. 560—561.

[37] For a theoretical analysis of the judgements see NEALE, pp. 342 et seq.; FULDA—SCHWARTZ, pp. 52 et seq.; MARKERT, pp. 42 et seq.

13. The situation as existing on the level of international law has two planes, viz. that of bilateral agreements, and another of multilateral agreements. In the following we shall discuss two bilateral agreements of the more important ones. In both of them, obviously not by accident, the United States appears as one of the signatories. The two agreements are: the one negotiated between the United States and the Federal Republic of Germany, in 1954, the other the agreement signed between the United States and Canada, in 1959.

Article 18 of the Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States of America declares: "The two parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement or other arrangement among such enterprises, may have harmful effects upon commerce between their respective territories. Accordingly, each Government agrees upon the request of the other Government to consult with respect to any such practices and to take such measures, not precluded by its legislation, as it deems appropriate with a view to eliminating such harmful effect."[38] By virtue of this provision of the Treaty formal steps, investigation or judgement legally based on this provision, in particular the enforcement of the action of either contracting party by means of public international law, have not yet taken place. However, in concrete disputes on international commerce or economy, and in negotiations proposing their settlement frequent references was probably made to this passage of the Treaty. Disputes were certainly settled by mutual information by the parties, voluntary withdrawal, or through the channels of diplomacy. As an example we may quote the case of the often mentioned International Quinine Cartel. As has already been told, the United States Government chose the method of making representations through diplomatic channels and it approached the member states of the Common Market with the request to proceed against the cartel-members domiciled in their territory using the means of municipal law.[39] This means that in treaties or international agreements of the type quoted, international anti-trust law manifests itself in a heterogeneous form. Essentially it contains three elements, viz. 1. the giving of expression in an undetailed form under public international law to the fact that agreements and monopolies restricting economic competitions may produce noxious effects in the territory of the contracting parties; 2. the recommendation of consultation in such and similar cases in order that 3. the country concerned might take action with the means of its municipal law against the noxious effects of cartels and monopolies. Hence the mechanism of public international law has not though

[38] *Treaties of Friendship, Commerce and Navigation*, US–West German Treaty, 1954, 2 U.S.T. 1839, 1858, published by FULDA–SCHWARTZ, p. 102.

[39] See MARKERT, p. 43.

created a substantive international anti-trust law, still by mobilizing the municipal law of the parties it has opened channels of public international law, and in the meanwhile has codified in a largely general form a depreciatory value judgement on cartels and monopolies exercising a harmful influence.

Essentially the agreement of the United States of America and Canada declares that 1. the parties will consult with each other before taking any action or in any matter coming within the province of anti-trust policy, such as the initiation of investigations, which may concern the other party; 2. the parties will inform each other of the developments in anti-trust investigations or of measures of mutual interest, and also of their planned actions; 3. finally, although the agreement foresees to a certain degree joint anti-trust action, each party reserves the right to enforce its own provisions of law, in the manner deemed appropriate by it and within the limitations of its own laws against the activities of cartels and monopolies; 4. the parties will withhold any information of their consultations from the enterprises affected.[40] As may be seen in this instrument there are only vestiges of general powers under public international law for procedure against international cartels or, those of foreign states. The agreement is more or less an illustration of the tacit acceptance of the application of municipal law to alien subjects-at-law, when stress is laid on the nice balance of interests.

14. Of the multilateral agreements in the temporal order the *GATT statutes* of 1947, the *Rome Treaty* of 1957, the *OECD recommendations* of 1967 and the *ILA draft* of 1972 are noteworthy.

The statutes of the GATT do not speak expressly of international cartels and monopolies, still essentially the GATT purposes the liberalization of international economic relations and their relief of national and international protectionist ties. In this sign the statutes bring under regulation a number of fundamental and well-known institutions of international economic relations, such as the most-favoured nation clause, the *régime national*, national treatment, the customs union and the free-trade zones, the prohibition of discrimination, etc. However the GATT regulates and liberalizes also governmental measures which may come to fruition also in the practice of international cartels and monopolies. Such are e.g. the quotas, subsidies, dumping, and quasi-dumping underhand practices in prices.[41] Therefore the one way or the other the spirit of the GATT had to be extended to these phenomena of private economy, i.e. the recourse to the means of GATT had to be made possible against the actions of large business enterprises. The 1960 general assembly of GATT even passed a resolution in this sense, according to which the signatories to GATT declared their readiness for consultations if cartels, international or

[40] *Informal Agreement of US and Canada on Anti-trust Notification and Consultation Procedure, 1959*, published by FULDA—SCHWARTZ, pp. 104—105.

[41] *General Agreement on Tariffs and Trade (GATT)* Art. VI, XI, XVI.

domestic, operating from their territory display activities which cannot be reconciled to the objectives of GATT, and for negotiating methods for breaking down barriers to trade set up by the cartels in their operations.[42] Although no practice of any significance has yet developed within the limitations of this resolution, many even hold that no such obligation can be derived from the statutes of GATT,[43] still this channel is an existing one, and in the famous Kennedy round of 1967 of the GATT the participants almost pathetically confessed that with actions against the international cartels and monopolies within interstate co-operation, and for that matter in interstate co-operation, as created and channelled by GATT promising results may be achieved.[44]

After GATT the Rome Treaty of 1957 would follow in the sequence of multilateral agreements, still this Treaty will be discussed separately further below. The next step was the 1967 recommendation of OECD. This recommendation substantially contains, for the member states of the OECD, i.e. in addition to the United States, Canada and Japan the states of Western Europe, similar to those in theses the agreement between the United States and Canada, with two supplementary provisions. First, the member states whenever taking action against international business practices restricting economic competition shall try to co-ordinate such action, within the possibilities and the limitations of their municipal laws. Secondly, the member states shall co-operate in the formulation of mutually beneficial methods against restrictive practices of international cartels and monopolies.[45] What is a plus in this recommendation are international co-ordination and the general agreement to co-operate in the formulation of mutually profitable methods. However, within this scope no more concrete legal matter of public international law, legislation or practice has come into being either. What has been achieved is the agreement on consultation in the event of domestic governmental actions, and in certain cases joint action, however, in each case on the ground of the municipal legal systems. Here again the action taken against the International Quinine Cartel may be quoted by way of example.

[42] The decision has been published by TIRPITZ pp. 25—26.

[43] See KRONSTEIN, p. 125.

[44] Among others see the conference which took place in Geneva in the evening of June 30, 1967, and which eventually led to what was called the Kennedy Round. Here the parties concerned (before all the United States, the EEC and UNCTAD) agreed that the spirit of GATT must be given life in the struggle against protectionism. Here follows a short passage of the proceedings, referring to anti-trust law: "We almost failed. But somehow we managed to move the world closer to the ideal of free international trade. . . . *And now with the increasing acceptance of our anti-trust notions in regional and national legal systems adequate means to rid the international economy of private restrictive agreements are also at last available.* (Published by FULDA—SCHWARTZ, p. 1 et seq.); also see the contributions of many of the participants to the discussions in the 1970 ILA Conference, New York. (Report of the 54th ILA Conference, pp. 151 et seq.).

[45] The 1967 anti-trust recommendations of the Organization for Economic Co-operation and Development (OECD) see in FULDA—SCHWARTZ, pp. 103—104.

The story of the ILA agreement from 1959 till its formulation of New York, in 1972, testifies convincingly to the occasional birth of extreme opinions. The beginning was made with the absolutization of the principle of territoriality and, under French, German and Dutch, i.e. Common Market pressure, it ended in the combination of the principle of effect and territoriality.[46] Article 5 of the draft contains the thesis making for the backbone of the whole instrument. Accordingly: "A state has jurisdiction to prescribe rules of law governing conduct that occurs outside its territory and causes an effect within its territory if a) the conduct and its effect are constituent elements of activity to which the rule applies, b) the effect within the territory is substantial and c) it occurs as a direct and primarily intended result of the conduct outside the territory."[47] The original and extremely retrograde wording, which strictly speaking conflicted even with the anti-trust law and practice of the United States and the EEC, and e.g. with the relevant legislation of the Federal Republic of Germany, reads as follows: "International law, as evidenced by the general practice of states to date, does not permit a state to assume or exercise prescriptive jurisdiction over the conduct of an alien which occurs within the territory of another state or states solely on the basis that such conduct produces 'effects' or repercussions within its territory."[48] Even the new wording has many weak spots. Partly it appears as if the three conditions specified in Article 5 were conjunctive, and the third demanded the presence of an intended result prohibited by anti-trust law. Still in most of the cases it would be extremely difficult to produce evidence confirming the existence of such intention: as it is clear, in the life, variety of operation, methods, etc. of the cartels, from the simple association to price fixings brought about by mutual respect for one another's interests, the cartels put on forms which defy almost any attempt at producing evidence of the harmful intentions of the cartel. The valuation of the intention and any reflection on it were omitted even in the *Alcoa* and the *Swiss Watch Cartel* case,[49] and even the *Restatement Second* contented itself with stating that the internal effects had to be foreseeable. By this in fact intention, and so the subjective element were in point of fact objectivized.[50] This objectivization merely meant that in the subjective sense the members of the cartel could be reproached merely on the ground that they ought to have foreseen the prohibited effect actually supervening. Hence they could be relieved of the consequences of their acts if they could produce conclusive evidence to the effect that the consequences could not be foreseen, and the court would accept this excuse.

[46] For the antecedents of the New York Draft see MEESSEN, pp. 561—562.
[47] The text has been published in English an German by MEESSEN, pp. 562—563.
[48] Published by MEESSEN, p. 564.
[49] For details see paragraph 19 above, and the sources quoted there.
[50] Published by MEESSEN, p. 564.

However, the principal evil of the ILA draft is that for the time being it is merely a draft and even as such in its preamble it declares of itself that its provisions merely express "principles of International Law as guidelines to the resolution of problems concerning the assumption and exercise of jurisdiction by States in connection with restrictive trade practices."[51] We are therefore still far from the day when this draft compiled at the expense of persevering and strenuous work will become the generally accepted body of rules of public international law, and within a definite problem a coherent system of rules, to the need for which western literature refers[52] in a decisive form. However, what the draft has anyhow achieved is that in the given field the uniform, or at least harmonized model of thinking, the what is called international anti-trust law *Denkmodell*, of the jurisprudence of the western world extrapolated from legal practice and considerations of economic policy, has become more complete than before. It is somehow the legal archetype of what may be expected in the given field in municipal and international legislation, and what to some extent is, by way of the extension of municipal anti-trust provisions to external cartels, living in reality, though fraught with the contradictions indicated before.

§ 4. The international cartels and monopolies in the law of the European Economic Community

(a) *The statutory framework*

15. The law of economic competition is not unknown in the legal systems of the member states of the Common Market. The remarkable development of this branch of law has, however, set in already in the years following upon World War II. This holds in particular for the treatment of international cartels and monopolies. However, instead of enlarging on the analysis of the relevant municipal laws of the particular countries, a by itself enormous undertaking,[53] in the following we shall confine our investigations to the community law created in the process of integration. Still if we now turn *pars pro toto* upside down and in fact study the common international anti-trust law applicable to the totality of the member states and valid in each of them, then roughly speaking at the same time we have analyzed the relevant legal policy of the member states. In fact with slight exaggeration and simplification the

[51] "Principles of International Law as guidelines to the resolution of problems concerning the assumption and exercise of jurisdiction by States in connection with restrictive trade practices."

[52] See MEESSEN, p. 565 *(Ausblick)*.

[53] For the international anti-trust law of the member states see FULDA—SCHWARTZ (National Anti-trust Laws, pp. 147 et seq.), the national reports submitted on the subject to the 1972 ILA Conference (Report of the 54th ILA Conference, pp. 151 et seq.: *Extra territorial Application of Restrictive Trade Legislation*), and, monographically, for German law, SCHWARTZ (2) pp. 296 et seq.

community anti-trust law may be considered the extrapolation of the national laws on competition.

We have already spoken in detail of the appearance of the law of economic competition of the European Economic Community as applied within the Community.[54] As the statutory law we may in *medias res* set out from the fact that §§. 85 and 86 of the Rome Treaty do not contain express provisions as regards cartels and monopolies operating with international, i.e. partly extra-community partners. This is how literature sees the situation.[55] Still this follows clearly from the formulation of the two relevant articles, 85 and 86. According to paragraph 1 of article 85: "The following shall be prohibited as incompatible with the Common Market: all agreements between enterprises, all decisions by associations of enterprises and all concerted practices which are apt to effect trade between the Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market, in particular those consisting in: a) the direct or indirect fixing of purchase or selling prices or of any other trading conditions; b) the limitation or control of production, markets, technological development or investment; c) market-sharing or the sharing of sources of supply; d) the application of unequal conditions to parties undertaking equivalent engagements in commercial transactions, thereby placing them at a competitive disadvantage; e) making the conclusion of a contract subject to the acceptance by the other party to the contract of additional obligations, which, by their nature or according to commercial usage have no connection with the subject of such contract." This paragraph is closely tied with paragraph (3) of Article 85 which exempts certain cartels from the effects of the previous paragraph. Yet even from the provisions of this paragraph it is impossible to establish whether these applied to international cartels, i.e. to subjects-at-law outside the Community. Essentially this paragraph declares that the provisions of (1) may be declared inapplicable to such inter-enterprise agreements or groups of agreements, decisions of enterprise associations or groups of decisions, concerted practices or groups thereof, which, partly grant an equitable share of the supervening profit to the consumers, and contribute to the improvement of the production and distribution of goods, further, to technical development and economic progress without, however, (a) establishing such restrictions for the participating enterprises as are not indispensable for the achievement of the mentioned objectives, or (b) extending such possibilities to the participating enterprises as would be apt to eliminate economic competition in respect of a substantial portion of the goods concerned.

[54] See MÁDL (3), paragraphs 63 et seq.

[55] See e.g. HOMBURGER—JENNY, p. 18; FRISINGER, pp. 553 et seq.; SCHWARTZ (2) pp. 296 et seq.

Article § 86 which prohibits the abusive exploitation of the dominant position by the monopolies or enterprises, provides as follows: "Any abusive exploitation by one or more enterprises of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall be prohibited, in so far as trade between Member States could be affected by it. Such abusive exploitation may, in particular, consist in: a) the direct or indirect imposition of any inequitable purchase or selling prices or of any other inequitable trading conditions; b) the limitation of production, markets or technological development to the prejudice of consumers; c) the application of unequal conditions to parties undertaking equivalent engagements in commercial transactions, thereby placing them at a competitive disadvantage; d) making the conclusion of a contract subject to the acceptance by the other party to the contract of additional obligations which by their nature or according to commercial usage have no connection with the subject of such contract." Neither the Community rules subsequently promulgated by the Commission or the Council of Ministers of the European Economic Community pursuant to Articles 85 and 86 of the Rome Treaty incorporate provisions extending to international cartels and monopolies.[56]

It stands to reason therefore that against the noxious actions of the international cartels and monopolies, which abounded in the past, and are still abounding, the coercive power of the law cannot be thrown into the scales but by the appropriate interpretation of the provisions of the Rome Treaty and their extension to the international cartels and monopolies. This is at least what literature says,[57] and this is indicated also by the practice of the Commission and the Court of Justice of the European Economic Community.[58]

(b) *The response of theory*

16. Confronted with the problem in a most graded and comprehensive form was jurisprudence. This was the case not only because it was adequately acquainted with American practice and literature and because it justly presumed that in the wake of the anti-trust law embodied by the Rome Treaty the problem would turn up also in the field, but also because it had a direct share in the formation of the first steps of practice. Just one concrete and a general example. The concrete example is the following: Professor PESCATORE is a well-known theorist of what is called European economic law, and at the same time a judge of the Court of Justice of the European Economic Community. In this capacity he took part in forming the judgement in cases like the

[56] For the supplementation see MÁDL (3) paragraphs 63—65.

[57] See the literature quoted in Note 55, for the theoretical problems, section 16 et seq. below.

[58] See sections 20 et seq. below.

Farbstoffe and *Continental Can* test cases of the valuation of international cartels under Community Law.[59]

The example of a more general nature is provided by the work of Professor KRONSTEIN, who in both the United States and then the Federal Republic of Germany took part in the formation of national anti-trust practice (legislation and legal policy), in the what was called *kalte Montage*, and at the same time as theoretician he wrote a book on the law of the international cartels, a work often quoted in western legal literature, and perhaps the best in this subject-matter. He formulated the first European source of the Community anti-trust institutions, i.e. the first draft of the treaty establishing the Coal and Steel community (Montanunion). In §§ 65 to 67 this legal instrument transplanted into Europe the more rigorous anti-trust spirit. From these articles eventually Articles 85 and 86 of the Rome Treaty grew out.[60]

There is an extensive and theoretically rather differentiated literature dealing with the problem of cartels and monopolies in West-European jurisprudence. Unlike American literature, which concentrates rather on essential pragmatic questions (this is what is called the essential *pragmatic man*), in Western Europe literature deals with the problem from a number of other aspects too, viz. the various jurisprudential aspects down to the dogmatics and philosophic values of the legal institution in question (this is what is called the *philosophic man*). More adequately than a historical survey perhaps the emphasis of the principal elements and to a certain degree polarizing valuation will convey the most clear-cut picture of this European literature. For the ideological content and theoretical position three different currents may be distinguished in West-European jurisprudence,[61] viz. first, that of the freedom-party, secondly, the law-party men, and thirdly, that of the builders of dogmatics.

17. The partisans of the freedom-party defend, with more or less painful stiffness, occasionally in a contradictory form, somewhat embarrassedly, in the freedom of the international cartels and monopolies ultimately their domination, and even defend this against the law of competition of the EEC. Uniform with this attitude is their argumentation that community law cannot

[59] Of relevant papers and studies see, in the List of Sources, PESCATORE (1), PESCATORE (2), PESCATORE (3). For the Farbstoffe and Continental Can cases see sections 23, 24, 26 below.

[60] See KRONSTEIN's monograph on the law of international cartels in the List of Sources. For his role in American and post-war anti-trust practice referred to here, and his further roles as one of the principal actors of the *kalte Montage* and as one of makers of the Treaty of the European Coal and Steel Community see his book, *Briefe an einen jungen Deutschen* (Verlag Beck, München, 1968, p. 323). *Kalte Montage* is the term used for the "dismantling", or de-cartellization of the German monopolies after the War as opposed to the *heiße Montage*, the physical demantling of certain German large manufacturing plants and machine stocks and their transfer to the Allied.

[61] Of the literary sources here analyzed the most outstanding are (see also in the List of Sources): FRISINGER, HUNTER, HOMBURGER—JENNY, THEMAAT, SCHWARTZ (2), chapter »Die Zulässigkeit kartellrechtlicher Hoheitsakte gegenüber Ausländern im Ausland«; KRONSTEIN, chapter »Schlußbetrachtungen«, DERINGER (2).

be applied to international cartels and monopolies, which have not their seats in the countries of the Community. Their motives are manifold, such as e. g.

— that §§ 85 and 86 of the Rome Treaty are strictly speaking not substantive rules, but rules of private international law, or conflict rules;

— that the enforcement jurisdiction of the Court of Justice of the European Economic Community would pass somehow on grounds of the theory of law, still at the same time this would mean the extension of the legislative jurisdiction to abroad, whereas in accordance with the general theory of law and also under international law legislative jurisdiction is tied to a definite territory. Consequently any extension of this jurisdiction would infringe the sovereignty of other countries;

— how can any Community authority, e.g. the Commission or the Court of Justice, take evidence or perform executory acts abroad, e.g. how can a Community authority demand the surrender of incriminated contracts, or seize such, how can it collect fines, or how can it achieve the voidance of a cartel agreement made abroad, or the suppression of monopolies abusing their dominant position;

— how can the censured acts of affiliated companies operating within the Community be imputed to the parent companies abroad, i.e. to alien subjects-at-law, and thus carry to abroad the categories of torts of municipal substantive law.

All this would mean that no sanctions can be imposed on international cartels and monopolies unless they have a domestic member, and even then only on such member. In all other cases the rules of municipal law can be enforced against them only in conformity with public international law and within the limitations of this law.[62] And yet where are these principles of public international law? Nowhere, as we have seen. The OECD recommendation relating to Western Europe is merely a recommendation and even this decrees mutual information and consultation.[63] However, in the discussions of professional literature the most cogent arguments of the freedom party appear as economic interests in the most undisguised form. Obviously it is somehow hypocritic to adduce the liberalization of world trade as an argument in this connection,[64] for as has already been made clear earlier, in one of its critical phase of development of GATT the Kennedy round, too, emphasized that the unfettered development of world trade should be guaranteed by anti-trust legislation.[65] The truth and essence of the case are indicated by phrases like that the "escalation" of Community cartel law might "discredit European law" abroad, in particular in the United States, and that the enterprises of foreign states fear-

[62] FRISINGER, p. 556.
[63] See section 14 above.
[64] FRISINGER, p. 559.
[65] For the reference see 14, Note 44.

ing their interests in their efforts to safeguard them might be forced to withdraw their business transactions from under the rule of Community law.[66] It was not quite accidental that this opinion was in a particularly emphatic form voiced in the United Kingdom both in professional literature and in official quarters. As is generally known, the United Kingdom is the home country of most of Europe's giant enterprises, among others of the Imperial Chemical Industries Ltd., on which in the Farbstoffe case sanctions under cartel law were imposed by the Court of Justice of the Community.[67]

18. The arguments of the "law party" are pragmatic rather than theoretical. Therefore these arguments are partly identical with those which have been discussed in connection with American anti-trust law earlier. I.e. defence put up against the effects of torts, provided it does not imply direct external governmental actions, does not infringe sovereignty. Further without this chance of defence the anti-trust provisions of Community law would be but a blank sheet of paper; also as has been seen, tacitly several international agreements recognize the anti-trust jurisdiction of the states and formations of states under international law, and the ILA draft promises the introduction of international rules of general validity.[68] To these we have to add special arguments, e.g. that §§ 85 and 86 of the Rome Treaty are what are called self-executing rules, i.e. rules which are directly effective in the territory of the Common Market without any intermediary procedure, that even if the Rome Treaty does not expressly declare that it applies to international cartels and monopolies, neither there are provisions in it to the contrary. It stands to reason that the founders of the Community did not intend to restrict the operation of their law exclusively to home cartels and put a check on the noxious domination of these cartels. A policy of this kind would have favoured similar manoeuvres of foreign cartels and monopolies. A policy to the contrary is in any case likelier, namely that the founders of the Common Market wanted to strengthen the competitive position of the economy and enterprises of the Common Market against the operations of foreign business interests. Finally, it is practice which will offer a reply to the question whether or not Community anti-trust legislation can be put into action against foreign cartels and monopolies. The first, and tentative steps taken in practice, however, tend to confirm the theoretical "yes".[69] In view of all this many in Western Europe with a pro-

[66] FRISINGER, p. 559.

[67] Of the relevant English literature see HUNTER pp. 221 et seq. For the official standpoint expressed in the *Aide mémoire* of the British Government to the EEC Commission in connexion with the decision passed among others also against the *Imperical Chemical Industries Ltd.* in the *Farbstoffe* case see the Report of the 1970 ILA Conference (ILA publication, 1971, pp. 185—186). For the participation of the United Kingdom of the European giants see MÁDL (3), paragraphs 29—30, for the *Farbstoffe* case sections 23—24 below.

[68] For details see section 14 above.

[69] See sections 20 et seq. below.

phetic faith believe in the Community law of competition. It is on the ground of progress made so far, and so also on the ground of tendencies in literature, the realities of economy, thus the market organizing functions of private capital, and in the course of this organizatory activity its distorting excesses, national and European legislation and legal practice with integration as its goal, that KRONSTEIN makes the statement that anti-trust law notwithstanding its weakness and its impotence against international cartels and monopolies theory will undoubtedly espy the great chance *(die große Chance)* which looms up in the palpable distance; it is commitment and courage that are needed, and then this chance might be moved even closer, the chance namely of the creation of man-oriented harmony between the economic order expressing the interests of the community and the order of international private economy.[70] A loftily sounding commitment, in fact. Still there is a great distance between espying the chance and carrying into effect. The bridges of the benevolence of the scholar might perhaps help cut down some of this distance, still the antagonism of the given production relations is stronger than benevolence, and its malignant current is washing the banks and tantilizes the benevolent builders of bridges.

19. After the quotation from KRONSTEIN which is philosophically meaningful, and after its partly enigmatic closing note, let us continue with a few references to the *dogmatic literature* of the issue. Here we would lay stress on the considerations which relate to some of the outstanding factual elements of articles 85 and 86 of the Rome Treaty.

One of these elements defines the essence of concentrated practices. Thus e.g. many delimit concentrated or harmonized practice from what is called price leadership, a method by itself sufficient in the United States for the establishment of concentrated practices, and are inclined to the thesis that even for concentrated practices at least some sort of an intrinsic agreement of will *(innere Willensübereinkunft)* is needed.

Another problem, again forthcoming from articles 85 and 86, may be formulated as follows: Have the restrictive activities of the international cartels and monopolies to affect the trade between the member states of the Community? On this understanding dogmatic literature concludes that if the international cartel or monopoly affected the trade with anyone of the member states and a third state (not-member-state) only, this activity would be outside

[70] Two characteristic sentences quoted from KRONSTEIN'S *Ausblick*, pp. 510—511: "Even if we cannot offer any proprietary solutions for the problems we have raised — this we would emphasize once again — in the end we should like to refer to the great chance, which we have been offered by the development of the EEC to a truly open market . . . And ultimately we need courage in order to reach a goal. We believe that one of the decisive criteria of the "value" of this order to be considered and to be shaped is whether in the colossal technological concentration of modern economy there is a place at all for the single entrepreneur, and whether a solution of social problems can be achieved, when the weaker party preserves its freedom, or regains it, to move freely in the markets."

the sphere of operation of the Rome Treaty and come under the ruling of municipal anti-trust law of that particular member-state. In the background of this thesis lies the intention implied in articles 85 and 86, notably to bring about a framework for the law of competition of the Common Market. Even here the Rome Treaty wants to display before the world the Common Market, and not its policy to protect the domestic economies against the influences of the cartels forthcoming from third countries. With this question another is closely tied up, namely whether the trade of the particular member states with states associated with the Common Market may be drawn within this category of the trade of Common Market countries among themselves. So far no decision has been pronounced by the Commission, nor is there a judgement of the Court of Justice on record. In any case the opinion prevails that the trade of the Common Market countries with countries associated with the Common Market cannot be drawn within the category of interstate trade of the Common Market countries proper unless the operation of this category has been extended expressly to the relations of the associated countries and the Community by the treaty or contract establishing the *associated* status.[71]

A third problem of dogmatical nature is that of the concrete meaning of restriction of competition, i.e. in what the restrictive practices initiated by the international cartels in reality consist. According to theory a case of restriction of trade will be present when the private autonomy of the decisions of those taking part in the economic processes sustains injury.[72] More explicitly this means (a) that those concerned are unable to formulate freely their decisions directed to contract-making, or other agreements, association, or any other decision of an economic nature, i.e. they forfeit their freedom of decision; (b) that they forfeit their freedom to choose their partners, e.g. when owing to the dominant and monopolizing power of the extraneous parent company they are forced to form the contract with enterprise X and not with enterprise Y of their choice; (c) an injury of private autonomy will supervene also when the international cartel or monopoly restricts the enterprise in the freedom of its internal economic decisions.

A fourth problem of significance concerns that of the efficacy of restrictive practices. On the whole these practices must be capable of curbing free competition. Still this may mean a number of things. Among others it means that the enterprises concerned have a fairly large share in the product in question, otherwise they could hardly restrict competition or exploit their dominant position to the detriment of other interests.

[71] There is a provision of this kind in §§ 51—52 of the agreement for association between the European Economic Community and Greece. (See HOMBURGER—JENNY, p. 33).

[72] See HOMBURGER—JENNY, pp. 34 et seq.

Another by no means insignificant question in this connection is whether the action of the cartel, or the cartel itself, or the dominant position must be directed expressly to the restriction of competition, or does the potentiality of restriction suffice. Dogmatic literature, which tries to reinforce the latter opinion, professes the theory of adequate effect, i.e. whether or not from the cartel or power position in question restrictive effects may in conformity with practical experience and in the normal course of affairs supervene. Authors holding this doctrine are prepared to make concessions to the subjectivists (who believe that as factual condition the intention, too, must be present) only in so far that the so-called remote effect would not be sufficient in their opinion either.[73]

Theoretically at least the dogmatic position mentioned last, viz. the undesired state of the dominant position controlled by § 86 will supervene already when the enterprise or monopoly in question has no competitor in the given branch of industry and in a relatively large area of the Common Market, when the monopoly is not exposed to effectual competition, irrespective of whether its intention is directed to this, and actually exploits this situation, may sound somewhat harsh. The monopoly may exploit this situation either by being present in the territory of the Common Market directly, e.g. through an affiliated enterprise, or indirectly, by its goods, merely because it is the sole or monopolistic producer, or distributor of such goods as cannot be procured from another market.

Another essential element of dogmatic litterature, and for that matter the last problem of a dogmatic nature worth reviewing merely for the sake of obtaining a complete picture, is the fairly shaded formulation of the exempting conditions, notably by virtue of § 85 (3) on what conditons may exemption be granted to useful and desirable company co-operations, quasi-cartel co-operations, or to concentrations of enterprises. Literature emphasizes that exemption should be granted in any case if the act in question is not in conflict with the policy finding expression in the Rome Treaty, moreover it is in agreement with it. Hence what is meant is any international co-operation or international company which comes within the scope of the policy laid down in § 86 (3) of the Rome Treaty. Literature lays stress on the function of the Commission of the EEC in the supervision of such contracts and acts, and so on its part in shaping international co-operation and economic associations in a positive sense, i.e. in the spirit of the provisions of law of the Common Market. This function and this obligation of the Commission have been laid down expressly in the Community regulations following in the wake of §§ 85 and 86.[74]

[73] In particular see DERINGER (2) notes 40—43.
[74] For this competence of the Commission see MÁDL (3) paragraphs 64 et seq.

(c) *The reality of practice*

20. What practice in reality is, is borne out by the statements of a general nature of the Commission and also by concrete individual decisions of the Commission or the Court of Justice, as the case may be.

The statements of a general nature of the Commission may also be considered the quasi-authentic interpretation of §§ 85 and 86. These statements with reference to the rules attached to §§ 85 and 86 in a generalized form declare their applicability to international cartels and monopolies. Three statements of the Commission of significance may be quoted here. The one has been taken up in the general report for 1969, the other figures in the general report for 1971 as the section on the law of competition, and, finally, a third statement is the relevant section of the report on economic competition (1971).[75] In these the Commission expressly states that the domiciliation of an enterprise outside the territory of the Common Market does not preclude the application of § 85 to the contracts or agreements of this enterprise if these have repercussions on the trade among the countries of the Common Market and otherwise constitute acts infringing the Community rules prohibiting restrictive practices.

The statements of the Commission defining its policy in matters of competition may in respect of international cartels and monopolies be regarded as general guide-lines in conformity with which the Commission will proceed as authority in matters of competition in the future. Consequently the function of these statements is very much like that of the guide-lines from time to time promulgated by the US Department of Justice as anti-trust authority. These too give indications of the critical line outside of which cartels and monopolies have to reckon with procedure under anti-trust legislation.[76] Obviously, however, these principles too are exposed to the general fate of principles, viz. that they are dependent on the reality of practice and are worth only what can be translated of them into reality in practice. And it is but an element of this reality that in respect of the critical line the last word is that of the Court of Justice, for the truly last world must be looked for somewhere in the relations between the forces of capital and the capitalist state.

21. What has come true of all this has found expression in the individual decisions and judgements respectively of the Commission and the Court of Justice. Decisions and judgements have to be studied in conjunction, because the judgements of the Court of Justice have in all cases been preceded by the

[75] See the *1969 General Report*, paragraph 543, *1971 General Report*, paragraphe 617; *1971 Bericht über Wettbewerbspolitik*, paragraph 131.

[76] In the document "Merger Guide-lines" (published by NEALE, pp. 494 et seq.) the US Department of Justice lays down the purpose of the Guide-lines (Section 1): "The purpose of these guide-lines is to acquaint the business community, the legal profession, and other interested groups and individuals with the standards currently being applied by the Department of Justice in determining whether to challenge corporate acquisitions and mergers under section 7 of the Clayton Act."

decisions of the Commission, and essentially these judgements refer to the very same matters as the decisions of the Commission. However, there are decisions of the Commission which have never reached the phase of judgements and have been carried through even without judicial decision. In the following we shall discuss, of the practice of the Commission and the Court of Justice, five decisions of the Commission, which have reached the judgement phase, and a single decision, which has not reached it. Their analysis will take place by grouping them round issues of law of vital importance. The six cases are in the temporal sequence the following: *Transocean Marine Paint Association*, June 27 ,1967, *Farbstoffe*, July 24, 1969, July 14, 1972, *International Quinine Cartel*, July 26, 1970, December 14, 1972, *Boehringer*, November 25, 1971, December 14, 1972, *Beguelin*, November 25, 1971, *Continental Can*, December 9, 1971, February 21, 1973.[77] In the following these decisions and judgements will be put to a scrutiny by the principal issues and legal questions.

22. A group of questions of prominence consists of those which relate to the legal valuation of the actual economic weight of the cartel restricting competition, i.e. to the provision of § 85 of the Rome Treaty according to which only cartels are under a ban which in respect of a considerable portion of products restrict competition and distort the trade among the member states. This is stated in all judgements referred to above. By way of example, however, let here the cases of Farbstoffe and the International Quinine Cartel be analyzed.

As regards the magnitude and actual economic weight of the International Quinine Cartel and of its character, on hand of the decision of the Commission[78] and the appeal lodged by those concerned the Court of Justice made the following statements: The members of the International Quinine Cartel were in the position to establish uniform prices for almost the total mass of the products in question marketed by the Cartel in the Common Market. By this measure the Cartel could as a matter course restrict the trade among the member states of the Community and affect this trade in a manner prejudicial to these states. Also within the Common Market the Cartel could restrict competition to a high degree. Owing to the large volume of participation the series of agreements directed to the limitation of production brought about the same effects. In the operative part of the judgement verbatim the following was stated: "The Court gave special consideration to the number and weight of the enterprises taking part in the Cartel, their share in the market of the Community controlled by them, further the market conditions which existed at

[77] The first date in brackets is that of the decision of the Commission, the second that of the Judgement of the Court of Justice.

[78] See paragr. 2 of the decision of the Commission of July 19, 1969. The decision has been published in Journal Officiel, No. L 192, of August 5, 1969.

the time of the perpetration of the acts prohibited by the Cartel."[79] Without dealing expressly with the international character of the Cartel, yet indirectly affecting this,[80] the Court of Justice approved the decision of the Commission by which under § 85(2) of the Rome Treaty the International Quinine Cartel was declared invalid and also approved the fines imposed by the Commission. The fines so established amounted to 210,000 accounting units for Nedchem, to 190,000 accounting units for Boehringer, and 35,000 accounting units for Buchler. At the time of the decision an accounting unit represented four West-German marks, as declared in the decision of the Commission.[81] In the case of a Cartel representing a share of this extent in the market the investigation into the economic significance going to critical extremes was from the legal point of view naturally not too interesting. What was of interest was that the Common Market could with its public law force take a stand at all against the economic power the Cartel meant, and could stave off pleas of minor importance brought forward by the defence, such as e.g. the Cartel was useful for the mitigation of the critical shortage of quinine at certain places, or that action against the Cartel was barred by prescription.[82] For the lower limit of dimension and economic significance rather the Transocean case was characteristic. Here the share of the partners of the Cartel in the marine paint industry was in all certainty below 50 per cent in the Common Market. Although for the very same reasons the Commission in its decision did not publish absolute figures or the actual participation, from the wording of the decision a share of like value may be inferred. "The contract of association did not make it possible for the members to restrict or eliminate competition in a substantial portion of the product in question. According to data at the disposal of the Commission the members of the association represent only about . . . per cent in respect of the given product in the territory of the Common Market, and in the territory of the Common Market the members of the association are exposed to the strong competition of larger marine paint manufacturing concerns which market their products also, in the countries of the Community. For all these reasons the cartel created by the association does not come within the purview of § 85(1), but the provisions of (3) have to be applied to it; Transocean may by this contribute to the improvement of competitiveness in the face of large competitors, what in fact was the purpose of clause (3) of the Roman Treaty."[83]

[79] The judgement, with the operative part verbatim, has been published in Europarecht, 1971. No. 1, pp. 41 et seq.

[80] So the relevant literature; e.g. see EMMERICH, p. 321.

[81] See paragraphs 1—2 of the relevant part of the decision of the Commission. In this connexion the Commission tables the equivalents of an accounting unit in the currencies of the countries of the enterprises concerned.

[82] Paragraphs 2 and 9 of the relevant part of the judgement.

[83] The decision of the Commission in the *Transocean Marine Paint Association* of June 27, 1967 has been published in the Amtsblatt, No. 163, of July 20, 1967.

23. Hence the extension of the law of competition of the European Economic Community to the international plane, its application to subjects-at-law outside the territory of the Common Market, except for the establishment of the voidness, did not take place in the judgement *in re* International Quinine Cartel. As a matter of fact the fine was imposed only on members of the Cartel domiciled in the Common Market countries. However, in certain respects the judgement against the Cartel had its repercussions on the international plane, and this for the following reasons. As the aftermath of the judgement a Cartel member, viz. the firm Boehringer, applied to the Court of Justice for the inclusion in the fine imposed on it of a fine paid by it and remitted to the United States, which had been imposed on it by a United States court as soon as the judgement had been passed against the International Quinine Cartel. The Court of Justice held, however, that the enforcement of the law of the European Economic Community relating to competition could be restricted neither by international interrelations and therefore dismissed the action of the firm Boehringer.[84] However, the great bomb was blown up in the Farbstoffe case, so often mentioned. The same happened in the Beguelin case a half a year before.[85] Since, however this case had less economic and political weight, accordingly the repercussions it elicited had a slight effect only. The case of Continental Can, determined by a decision very much similar to that passed in the Farbstoffe case, did not seem to be such extraordinary substantial and anyway the decision in the judicial phase is of recent date only.[86] It is true, though, that even so the decision provoked very soon substantial confusion, partly on the part of authors holding apologetic views, partly in practice among others in the form that an appeal was initiated against the Commission's decision. In the lawsuit the motion of the attorney, if with caution, was formulated in the sign of this confusion.[87]

Hence the Farbstoffe case is the one which represents best the question of law of the extraterritorial application of the Community law of competition now in the sphere of the application of law. For the dimensions of the case and its significance it appears to be worth while to review the facts at issue briefly. What is significant of the dimensions of the case is that it embraces nine judgements of a volume of 724 pages, here included the attorney's motion. The

[84] The judgement in *Boehringer Mannheim v. Kommission der EWG* No. 7/1972 is dated December 14, 1972 (stereotyped edition of the judgement).

[85] The judgement No. 22/1971, dated November 25, 1971, in *Beguelin v. Import-Export, Nizza und Marbach, Hamburg* has been published in Amtsblatt C 9 of February 2, 1972.

[86] For the decision against *Continental Can Co. New York* of December 9, 1971, see Journal Officiel, No. L, January 8, 1972. According to *Europarecht* (Vol. 1973, No. 2, p. 155) the judgement was passed by the Court of Justice on February 21st.

[87] For this comment of literature see FRISINGER, p. 557; the institution of the action was indicated by the motion No. 6/1972 of November 21, 1972, of the attorney-in-chief of the EEC submitted in this case to the Court of Justice. (Official stereotyped edition.)

judgements among others affected such by no means insignificant concerns as the Imperial Chemical Industries Ltd; the two German giants, viz. Badische Anilin und Soda Fabrik and Bayer, the in like way large Swiss concern, Ciba and Geigy. By the side of the nine large concerns sued — through external affiliations, associations or cartels — the judgements affected seventeen chemical enterprises, viz. a French, two British, four Swiss German and Italian, a Dutch and American (the likewise giant Dupont de Nemours concern).[88]

According to the facts at issue given in the judgements justly figuring as treatises of economic and legal policy the enterprises participating in the cartel had a share of 80% in the given branch of industry in the territory of the Common Market, i.e. a what may be termed oligopolistic situation had been brought about in this branch of industry. In the possession of this power between January 1964 and October 1967 in the whole territory of the Common Market the Cartel carried through three general price raises, or brought about such by mutually concerted attitudes *(abgestimmte Verhaltensweisen)*, without formal contracts. The three price raises meant an overall price increase of 32%. Owing to the 80% participation in the market the extraneous 20% were under a compulsion to follow suit. The Commission of the European Economic Community because of the price increase by Decree No. 17[89] and also because it assumed that there was a case infringing § 85 of the Rome Treaty, on May 31, 1967 instituted proceedings against the enterprises taking part in the price raise, and then after an inquiry in the course of which the enterprises could plead in writing and orally, on July 24, 1969, in like way by Decree No. 17[90] passed its decision. Accordingly (a) the Commission established that the price increase took place in consequence of the Cartel, viz. the concerted attitude of the participants, by which in the given branch of industry the freedom of trade and competition among the member states was restricted, and so § 85(1) of the Rome Treaty infringed; (b) therefore the Commission gave judgement against both the members against which inquiry had been instituted and the extraneous members (aa) by enjoining on them not to persist in their attitude; and (bb) imposing a fine on the nine concerns being the equivalent of a total of 440,000 accounting units, i.e. not quite 440,000 US dollars at that time.

[88] The following judgements (judgements were passed by the Court of Justice separately in the case of each concern) and the motion of the attorney, serving as basis for this analysis, have been published by the Court of Justice: *Schlußanträge des Generalanwalts H. H. MAYRAS in den Farbstoffe-Rechtssachen 48, 49,* 51—57/1969: *Urteil in den Rechtssachen 48/1969 Imperial Chemical Industries* (London—Manchester), *49/1969 Badische Anilin- und Soda-Fabrik* (Ludwigshafen), *51/1969 Farbenfabriken Bayer* (Leverkusen), *52/1969 Cina-Geigy* (Basel), *53/1969 Sandoz* (Basel), *54/1969 S. A. Française des Matières Colorantes Francolor* (Paris), *Cassella Farbwerke* (Frankfurt a/M), *56/1969 Farbwerke Hoechst* (Frankfurt—Hoechst), *57/1969 Azienda Colori Nazionali* (Milano).

[89] For the details of the Commission's competence in cartel affairs see Decree No. 17 (see *Competition, Decree R 17/1962 of the Council*). The conditions for the institution of procedure have been brought under regulation in particular in §. 14.

[90] Ibid. §§ 9, 15—16.

The concerns filed an appeal against the decision of the Commission at the Court of Justice. In the lawsuit, in which many prominent representatives of jurisprudence acted as experts,[91] the Court had to decide on a number of important issues. The Court of Justice dismissed the appeal of the plaintiff enterprises and pronounced the following principal theses in its judgement: (a) The provisions of § 85(1) of the Rome Treaty are applicable also to concerns having their seats outside the territory of the Community whose unlawful conduct materializes directly in the territory of the Common Market. (b) The conduct of affiliations having their seats in the territory of the Community and forming an economic unit with their extraneous parent companies and in concrete cases following their instructions must be imputed to the parent company. In this case the applicability of § 85 of the Rome Treaty does not rely on the effect of the activities of the extraneous enterprises within the Common Market, but it relies on the circumstance that the activity of their affiliations in the Common Market countries within the Common Market is reckoned as the activity of the parent concern. (c) On this understanding the jurisdiction of the Commission must be deemed to extend to procedure against the parent concern. (d) This will be the case in particular when the restrictive practices within the Common Market were of significance and intended.

24. In connection with the judgement pronounced in the Farbstoffe case a legal problem of peculiar nature emerged, viz. that of the enforcement of the sanctions abroad. In this matter the attorney's motion and the judgements made the following four statements: (a) The establishment of restrictive practices as legally banned acts and of their noxious effects is by itself of significance and does not depend on whether or not those on whom sanctions have been imposed conform to the dispositions of the judgement, or whether or not the authorities of the Common Market can levy execution abroad. (b) The enterprises on whom sanctions have been imposed may voluntarily meet their obligations, an act which signifies the actual weight of the decisions of the Community. In international practice there are examples for voluntary performance.[92] (c) The judgement may be served on extraneous cartel members being the parent companies of the internal affiliated companies on the understanding that the censured conduct of the affiliations must be imputed to them. For the lawfulness of the act under Community law it is immaterial

[91] To the attorney's motion and to the judgements among others the following professors contributed their expert's opinions: BOMBACH, KATZENBACH, KLOTEN, ALBACH, JENNINGS.

[92] An example of this type is the case of the *International Quinine Cartel* (discussed above); one of the parties against whom judgement was given, (the German firm Boehringer) paid the fine of 80,000 dollars imposed on it by the New York Southern District Court in the *US v. N.V. Nederlandsche Combinate Voor Chemische Industrie* case. On this plea the firm later petitioned, in vain, for the inclusion of this fine as a set-off to the fine imposed by the Court of Justice of the EEC (see Rechtssache *7/1972, Boehringer v. EWG Kommission*, stereotyped official publication of the Court).

whether or not in the foreign country postal delivery of judgements is accepted under international law. The fact that alien cartel members and parent companies have instituted procedure against the decisions of the Commission is an indication of the materialization of the measures of the Common Market authorities abroad to a considerable extent. (d) In the event of an enterprise not having an affiliation within the Community, so that no postal delivery can be made to such affiliation, the communication of the decision of the Commission may be made directly to the address of the enterprise having its seat abroad. In the Farbstoffe case the Court of Justice waived dealing directly with the question, because the extraneous enterprises concerned had inland affiliations, so that the decisions of the Commission decreeing the imposition of fines could be delivered directly to the addresses of the affiliations. However, a from this point of view rather interesting decision of the Commission was born, namely in the case of Continental Can to be discussed subsequently. In § 3 of the decision the Commission stated that the present decision was to be forwarded to the New York address of the Continental Can Company.[93]

25. The next question of law, namely a question associated with the transformation of cartel or monopolistic positions, their reorganization in conformity with §§ 85 and 86 of the Rome Treaty, and the mechanism of the reorganization, turned up partly in the Continental Can case,[94] and in a yet more explicit form, in the Transocean Marine Paint Association case. As has already been made clear above,[95] this was an association formed from 1959 onwards and consisting of eighteen medium-size enterprises domiciled in altogether sixteen countries. The parties agreed that for a term of twenty years they would co-ordinate their technologies and price policy in the manufacture of marine paints. They undertook not to join similar organizations and to receive new members only by unanimous decision. The parties further agreed to submit any disputes arising among them to arbitration. The Commission established the fact that the activities of the association were calculated to restrict trade and production, and all this in a way prejudicial to the trade between the member states of the Common Market. Consequently the association came within the purview of § 85(1) of the Rome Treaty. Meanwhile the members of the association modified the agreement, in 1966, and submitted this amended agreement to the Commission requesting their exemption from the operation of the relevant sections of the Rome Treaty by invoking § 85(3)

[93] «La présente décision est destinée à Continental Can Company, Inc., New York». — as stated in Journal Officiel, No. L 7 of January 8, 1972. However, it should be noted that here too technically the decision was posted to the affiliated company. (See FRISINGER, p. 557).

[94] See section 26 below.

[95] See section 22 above. The decision of the Commission, Décision de la Commission, du juin 1967 relative à une procédure au titre de l'article 85 du traité — IV/223, *Transocean Marine Paint Association* — has been published in Journal Officiel, No. 163 of July 20, 1967, further by FULDA—SCHWARTZ, pp. 128 et seq.

of this treaty. The new agreement did not include some of the censured provisions of the earlier, and although even the new agreement conflicted with the provisions laid down in § 85(1) the Commision on considerations included in its decision of June 27, 1967,[96] by clause (3) of article 85 invoked deemed the exemption of the association to be justified. The Commission established as fact that by way of the association the participating medium-size enterprises could in the given branch of industry develop and rationalize the production of their goods and also improve their market conditions, in general step up the sales of marine paints. The Commission further established that the agreement bringing about the association was beneficial also for the consumers: they could meet their needs from a larger choice and could even buy kinds of paints which were not included in the list of products of the factories of their own country. This was of interest the more, because here was the case of an association of paint manufacturing firms spread over the different regions of the world (Europe, South-eastern Asia, Japan, Australia, Panama, etc.). So far sea-going vessels were compelled to carry as cargo enormous masses of certain kinds of paint so as to be able to renew the finish of the ships as needed. In the new situation enterprises operating in various regions of the world and their deposits made it possible that ships should have access to the type of paint used by them in any harbour of importance even when the local factory belonging to the port in question was not manufacturing exactly this paint. There were always deposits of the type of paints actually needed. The association in fact took care that the various types of paints should in a certain sense be rationalized, i.e. the current kinds of paints should be manufactured, or at least stored everywhere. The last statement of significance was that the advantages afforded by the association were the condition of raising the technology of the members of the association to world standards and of competing with their products of world standards with larger marine paint manufacturing concerns. The Commission went even further: it put into action its mechanism directed to the supervision and formation of the microstructure of the branch of industry and the firms in question under study. The decision of the Commission in this respect stated that "the members of the association were bound to notify the Commission of any changes associated with membership. The same applied to any supplementations or changes of any nature of the agreement. The association was further obliged to communicate any decisions of the board to the Commission, and so the awards of arbitration by virtue of § 23 of the agreement in so far as these apply to the interpretation and application of the agreement supervised by the Commission. Since an exemption had been granted primarily in order to assist medium-size enterprises in their efforts of rationalizing production and to establish a sales network, it was considered essential

[96] See section 22 above.

that the members of the association should forward a report of their operations to the Commission annually, and so also of their members, the admission of new members, and statements by enterprise of the quantity of marine paint manufactured by the members of the association. The parties were further bound to forward information on the trade among themselves, giving exact data, to the Commission."[97]

The Commission again took action in an effective form in the Continental Can case. Here the Commission, on December 9, 1971, enjoined on the concern to bring forward proposals not later than July 1, 1972, how it thought, by simultaneously carrying through the consequential changes in its organization, to give up its monopolistic position and discontinue the abuse of this position. However, no reorganization took place, and negotiations between the Commission and the monopoly let to no definite results. Moreover Continental Can, in an appeal to the Court of Justice, demanded the annulment of the decision of the Commission.

26. The case of Continental Can,[98] however, attracted interest mainly because here for the first time the question emerged of the application of Community rules relating to a dominant position (monopoly) to extraneous parties. The Commission as well as the Court of Justice of the European Economic Community for the first time stood before the application of § 86 of the Rome Treaty. For the first time the authorities of the Common Market had to decide what the criteria were for the establishment of a dominant position within a definite branch of industry, what the conduct was which meant the abusive exploitation of this dominant position in the meaning of § 86.

The facts at issue themselves were more than interesting. The Continental Can Company is America's and the World's largest concern manufacturing modern metal and plastic (synthetic) packing materials. (The concern employs in 208 factories and 200 sales centres a total of 62,000 employees, its annual turnover amounts to 1.8 billion dollars.) Under the leadership of this concern striving for monopolistic economic expansion a large international oligopolistic organization had come into being. The principal characteristics of this organization may be summed up as follows: (a) It amalgamated, or controlled and influenced seven large European enterprises,[99] which themselves were

[97] For the source of the quotation see Note 95.

[98] The decision of the Commission — Décision de la Commission de 9 décembre 1971 relative à procédure d'application de l'article 86 du traité CEE — IV/26 811 Continental Can Company — has been published in Journal Officiel, No. L 7, January 28, 1972. The decision of the Commission was contested on February 9, 1972 and the motion of attorney-in-chief K. ROEMBER — Schlußanträge des Generalwalts in der Rechtssache 6/1972 Europemballage Corp. Brüssel, Continental Can Company Inc., New York — was submitted to the Court on November 21, 1972 (official stereotyped publication of the Court).

[99] Continental Can included these are the following (with the principal index numbers, and without indicating that these concerns have absorbed a number of small enterprises and at the same time are partners in other concerns): *Continental Can* (the

parent companies of a number of smaller affiliations. For the economic integration of the Common Market in particular two enterprises out of the seven were of vital importance. The one, Schalmbach-Lubeca Werke A. G. (quoted as *SLW*) had its seat in the Federal Republic of Germany, the other, Thomassen and Drijver-Verblifa N. V. (quoted as *TDV*) was a company domiciled in the Netherlands. The combine of large enterprises so come into being with a staff of 143,000 working in 337 factories and a number of branches and sales centres, a turnover of 2,607,000,000 accounting units, i.e. roughly 2.5 billion dollars controlled the world market of packing materials. (b) Continental Can bought up these two largest enterprises operating in the Common Market, and with its seat partly in Brussels, partly in the United States, created the Europemballage Corporation, a holding company, which directly or indirectly (through capital interest, agreements, royalty contracts) controlled the two principal affiliated companies and a number of other European companies. (c) Continental Can could enforce its business policy through full or partial ownerships, financial policy, mutual representations on the boards, an intricate system of contracts, royalty agreements, the supply of information, market survey, agreements on price control and regulation of turnover. (d) In the course of building up this combine among the European enterprises of this branch of industry a re-grouping took place to which, through purchases, close to fifty minor European enterprises fell victims. (e) Through the partial reorganization of the scope of production of the directly controlled concerns, viz. SLW and TDV, and the redistribution of markets taking place automatically, these two concerns ruled over the German and the Benelux markets, and exported to the territory of each other only 0.7 to 2.5 per cent of their volume of production. Eighty to hundred per cent of the total output of the two concerns were sold within their own territories. Thus the earlier competition between the two came to an end. (f) The combined output of a large number of smaller firms operating in the Federal Republic of Germany and in the Benelux countries meant no risk to Continental Can. (g) Continental Can itself, which earlier was in like way a competitor in the Federal Republic of Germany and in the Benelux countries,

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principal data are shown above); *Europemballage Corporation* (with seats in the United States and Brussels) (its data may be derived from those of TDV and SLW, Europemballage being the holding company of the latter two); *Thomassen and Drijver NV (TDV)*, Deventer, Netherlands, 6900 employees, seven factories, annual turnover 106 million accounting units (originally an accounting unit was worth one US dollar, however, owing to the devaluation of the dollar the accounting unit is worth more dollars than originally); *Schmalbach-Lubeca Werke A.G. (SLW)*, Brunswick, Federal Republic of Germany, 13,200 employees, fifteen factories and several branches, annual turnover 193 million accounting units; *Metal Box Company Ltd (MB)*, London 52,000 employees, about one half in the United Kingdom and another half abroad, 85 factories, annual turnover 464 million accounting units; *Superbox SPA*, Firenze, 1000 employees, three factories, annual turnover 20 million accounting units; *J. J. Carnaud et Forges de Basse-Indre*, Paris, 8000 employees, nine factories and several branches, annual turnover 111 million accounting units.

ceased to be active in these markets, having merged its business interests in these countries with SLW and TDV.

As regards the question of law the Commission stated the following: (a) Continental Can is directly or indirectly active in the territory of the Common Market, therefore it must be considered an enterprise under § 86 of the Rome Treaty. (b) Since it controls the affiliations of Europemballage, it defines their economic policy and their conduct in the market. (c) The European affiliations have capital interests ranging between 50 and 90 per cent in the European market, therefore they may act irrespective of the competition of other firms. (d) The extraneous smaller firms do not constitute a serious risk merely because for the technological standards of this branch of industry they depend on Continental Can under patent-licence agreements and (e) because in the international money market they will be hard put to it when it comes to raise funds, rather than Continental Can which could finance 60 per cent of the costs of its association with SLW from proceeds of Eurodollar and DM sources. (f) Consequently Continental Can is in a large part of the Common Market in a dominant position. (g) This situation permits Continental Can to abuse its dominant position. (h) This has found expression in the concerted practice of SLW and TDV to refrain from competition, and so in a large part of the Common Market competition has virtually been eliminated. (i) Competition has been restricted by the enterprises concerned by way of patent-licence and other agreements already earlier. Now with the creation of this concentration of companies competition has ceased both in theory and in practice. (j) For this reason the criteria of § 86 of the Rome Treaty must be considered present, so that by Regulation No. 17 the monopoly of Continental Can may be declared void without any preliminary decision.[100] The Commission therefore enjoins on Continental Can to put an end to this infringement of law, and by making use of the chance offered by Regulation No. 17 bring forward its proposal not later than July 1, 1972.[101] Instead of bringing forward proposals abortive from the very beginning Continental Can contested the decision of the Commission before the Court of Justice of the Common Market. Already from the motion for closure of the attorney the conclusion could be drawn that the mechanism of the Common Market found itself in a critical position. It wavered and was about to yield to Continental Can and its European associates, or still better, European capital. As a matter of fact Continental Can demanded the voidance of the decision of the Commission, and did not even try to conceal the gist of its case in the petition. At one place it said that if the Court of Justice put its stamp on the decision of

[100] See *Competition, Decree R 17/1962 of the Council which* in §. 1 declares that " . . . any abuse of a dominant position on the market within the meaning of Article 86 of the Treaty shall be prohibited, *no prior decision to this effect being required*".

[101] Ibid., §. 3; accordingly as required by the nature of the actual case the Commission may decree the termination of the unlawful situation and enjoin on the parties to submit their relevant proposals within a definite term.

the Commission, in the domino theory this would raise problems in many branches of industry. At another place the argument emerging in this neurologic problem read: "Were § 86 applied to this and similar cases, such an interpretation would lead to very undesirable consequences in industrial policy."[102] The attorney general was in a rather precarious position. Obviously in this phase of the case enormous pressure was to be faced by him. In fact the principles of fair competition faced shipwreck, the principles namely which were so often and in so resounding phrases invoked when it came to defend the honour of the system. It was for this reason that one of the final conclusions sounded rather diffidently: "It is difficult, even in front of the changing competition conditions, not to realize, that not all of the Commission's statements are beyond doubt, some of the proofs are at least questionable."[103]

As regards the legal arguments these were but reflections of the intentions of economic policy. The one line of arguments was directed to produce evidence to the effect that § 86 could not be interpreted extensively. This article contained no concrete thesis applicable to a concrete case, it did not want to disapprove of the concentration by itself; a concentration could not be objected to unless it was the means of a conduct otherwise disapproved from the point of view of restrictive practices, unlike e.g. § 86 of the treaty setting up the Coal and Steel Community which included a monopoly supervising and restricting provision, only because the makers of the treaty wanted it to be included.[104] As regards the the results born in the European packing materials industry, Continental Can had no recourse to pressure to bring about the concentration, i.e. it did not make use of its dominant position to call to life the concentration (although there were certain patent-licence agreements and "pressure" for association, still in both cases the organs of TDV and SLW had "freedom" of decision). The provisions of § 85 prohibiting restrictive practices to the effect to prevent a party from associating with another could not be transplanted into § 86 unquestioned: in fact § 86 was void of a clause (3) of § 85 which would exempt actions of a positive effect from the prohibition. Consequently any analogy would be fraught with risks, and in the event of an interpretation so argued recourse must be had to the principle *in dubio pro libertate*.[105] Here we

[102] See p. 10 of the attorney's motion referred to in Note 90.

[103] Ibid., p. 21.

[104] §. 66 of the *Treaty of the European Coal and Steel Community*, covering several pages in the instrument, introduces an effective control of concentrations. Thus it declares that a preliminary authorization is needed for any concentration, unless this concentration is of a moderate extent only; . . . "any transaction which would have in itself the direct or indirect effect of bringing about a concentration . . . shall be submitted to prior authorization of the High Authority"; this authorization will be given only, if the concentration does not lead to restrictive consequences in composition. For details MÁDL (3), paragraphs 78 et seq.

[105] See the attorney's motion, p. 9 (Source: Note 98).

are again in the ship of the "freedom party" and are sailing on seas so well known.[106]

On another plane of the arguments the motion censured the Commission because of the inconclusiveness of its economic analyses. The last quotation was also a closing chord to these analyses. E.g. the motion stated that the Commission failed to take into account the possible increase of imports which would act as a factor reinforcing competition. It did not take note of the probable rate of production of what were called substitutes by other firms operating in the particular branch of industry. The Commission seemed to have forgotten that firms of the foodstuff industry, if need arose, could switch over to the manufacture of packing materials for their products and would have to depend on Continental Can and its associates to a lesser degree.

As regards the international element of the case, here neither the "freedom party" surmised any problems. In fact not even Continental Can argued that through TDV and SLW it was directly present in the Common Market, so that any acts of these two could be imputed to Continental Can. Also the case of Farbstoffe was a sufficiently strong precedent, and besides the main blow of the attack was anyhow aimed at the basic question, namely whether the Common Market was authorized at all from a political power position to challenge the lawfulness of such a monopoly. The "trial", viz. the wrestling between the legal principles of capital and the economic policy of the capitalist states, could be broken off here in a fitting manner by admitting that here we have a question of power rather than one of "lawfulness". Throughout the procedure it was evident that capitalism would not perish from its own lawfulness even when the Court of Justice decided against the monopoly and did not set aside the rule of law. The problem threatens from another quarter.[107]

The Court of Justice pronounced its judgement in the last days of February 1973, when the anti-trust policy of the Commission, so to say, won the war, but lost the battle, which was won by Continental Can.[108] As a matter of fact the Court held that an enterprise could with its dimensions abuse its dominant position (as has been seen, this was the principal issue in the case), still it stated at the same time that the Commission, with its economic analyses, failed to produce conclusive evidence as to the products in which Continental

[106] See section 17 above.

[107] For problems of the theory of the legal relations of great capital and capitalist states and the mutual relations of the latter the reader is referred to the relevant chapter of the author's work in progress. The following recent sources deserve mention in Hungarian literature of political economy: ÁDÁM (2), in particular the chapter "New dimensions — world concerns" (pp. 235 et seq.); ÁDÁM (3) *Világkonszernek apologetikája és kritikája* (Apologetics and critique of the world concerns) (pp. 717 et seq.); BENEDECZKI, *A világgazdaság kialakulása és fejlődésének főbb tendenciái* (The formation and principal trends in the development of world economy) (in particular pp. 87 et seq.)

[108] For the publication and this qualification of the judgement see Newsweek, March 5, 1973. Trust-Busting in the Common Market, p. 45.

Can held a dominant position, or as to the market where it held this position. Therefore the Court killed the decision of the Commission.[109] The question may now be asked, what is the victory in a war of a so far single battle worth, when this battle has been lost.

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Международные картели и монополии

Ф. МАДЛ

В наши дни международные картели и монополии принимают уже такие меры, что они не только ограничивают хояйственную конкурренцию внутри отдельных государств, не только разделяют внутренние рынки и доминируют над ними, но могут и вредным образом образовывать — согласно собственным своим интересам — экономические отношения между отдельными развитыми капиталистическими станами, и вообще между государствами. Поэтому в развитии права развитых капиталистических стран, даже в последнее время и в литературе всеобщего международного публичного права появились стремления и правове средства, с помощью которых хотелось бы ограничить или оттеснить — силой права — противоконкурентные акции международных картелей и монополий. Статья предоставляет догматический анализ и критическую оценку этих попыток, в первую очередь в отношении права США и Общего рынка, и соответствующих учреждений этих систем права.

Internationale Kartelle und Monopole

von

F. MÁDL

Die internationalen Kartelle und Monopole erreichten das Maß und die Macht wodurch sie nicht nur den wirtschaftlichen Wettbewerb im Inland einschränken, nicht nur die Inlandsmarkte aufteilen und beherrschen, sondern auch die zwischenstaatlichen wirtschaftlichen Beziehungen der entwickelten kapitalistischen Länder, im allgemeinen die internationalen Wirtschaftsbeziehungen schädlich bzw. negativ gestalten können. In der Rechtsentwicklung der entwickelten kapitalistischen Länder, und neuerlich auch in der allgemeinen Völkerrechtsliteratur erscheinen allmählich mehr und mehr Bestrebungen und rechtliche Mittel, mit Hilfe derer man die wettbewerbswidrige Aktionen der internationalen Kartelle und Monopole einzudämmen bzw. zurückzuhalten denkt. Der Aufsatz unternimmt den Versuch — vor allem bezüglich des amerikanischen Rechts, des Rechts des Gemeinsamen Marktes — eine dogmatische Analyse und kritische Wertung zu erarbeiten.

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The Security Council and International Law

by

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In the first part of the study, the place and role of international law in the work of the Security Council are defined from general aspects. The author points out that the Security Council is essentially a political body. Although the resolutions of the Council have to be in conformity with international law, they are not bound to give an exclusively juridical answer to the problems concerned.

The resolutions have to accord with the purposes and principles of the United Nations; as regards, however, problems coming under Chapter VII of the Charter, the Council may disregard positive rules of international law if same impeded an efficient action tended to secure peace.

The role of the Security Council is dealt with in the second part of the study in connection with the formation, application and development of the rules of international law.

Following an analysis of the relevant literature and the resolutions of the Council, it is stated that, for their majority, the resolutions of the Security Council are instructions to be executed. At the same time, numerous resolutions have been contributed to the formation and development of the general rules of international law as well. In case of the special rules of international law, however, it is not excluded theoretically that a resolution of the Council should become an element of accomplished law-making.

1. Place and role of international law in the work of the Security Council

The Security Council is essentially a political body. This was the intention its "Founding Fathers" had in mind originally, and this has been confirmed by the practice of 28 years. Admitting, however, that the Security Council is a body of political character, the question bearing upon the role of international law in its activity was raised necessarily. According to the Marxist view and approach, there is no contradiction in this respect, for the relations between politics and law, foreign policy and diplomacy or, more particularly, foreign policy and international law present themselves in a dialectical unity and in interaction.[1]

[1] See HARASZTI, GY.—HERCZEGH, G.—NAGY, K.: *Nemzetközi jog* (International Law). Egyetemi jegyzet (University textbook). 1970. pp. 21—22. Cf. TUNKIN, G. I.: *A nemzetközi jog elméletének kérdései* (Problems of the theory of international law). Budapest, 1963. pp. 213—247.

The problem of the interaction of politics and law proved to be a difficult point in the relevant Western literature, particularly in earlier times. Following the views of Vattel, there was thus a tendency to make a distinction between the two notions.[2] Various attempts and schools have offered a wide scope of options ranging from a rigid separation of the two notions to the negation of the existence or the legal nature of international law.[3]

It has to be recognized at the same time that some scholars in the West made a major progress in the investigation of some problems i.e. they did not confine themselves to the statement of general correlations in their research work. Thus several works and studies are available with valuable surveys on the application of international law in the work of the Security Council.[4] In the following an attempt is made to give a summary of some particular features of the application of international law in the activity of the Security Council, taking into account both the analysis of practical experiences and the critical treatment given in the relevant literature.

The Security Council, one of the principal organs of the United Nations is a political body, on the one hand; its structure, powers, and the main tendency of its activity are laid down in the Charter, on the other hand, it is in a special multilateral international treaty. It can be stated furthermore that the principles contained in Article 2 of the Charter, corresponding essentially to the general principles of modern international law, are applicable to the activity of the Security Council as well. Analyzing carefully the wording of Article 1, however, a subtle distinction can be found. Whereas international law is not mentioned in connection with the "effective collective measures" to be taken in order to maintain international peace and security, it is the purpose of the United Nations, in the wording of the second part of point 1, "to bring about by peaceful means, and *in conformity with the principles of justice and international law* (author's italics), adjustment or settlement of international disputes or situations which might lead to a breach of the peace".

Is a conclusion following from the above cited disposition that the measures taken in case of a breach of the peace i.e. those effected by the

[2] HIGGINS, R.: *Policy considerations and the international judicial process.* The International and Comparative Law Quaterly, January, 1968. pp. 63—64.

[3] Курс Международного права, том 1. стр. 237—246. (A Course of international law. Moscow, 1967. Vol. I., pp. 237—246.) See also: NAGY, K.: *A nemzetközi jog jogrendszerbeli helyének és tagozódásának néhány kérdése a jog általános fogalmának tükrében* (Problems of the place and classification of international law within the legal system, in the light of the general concept of law). Jogtudományi Közlöny, 1—2/1972 p. 39.

[4] WRIGHT, Q.: *International law and the United Nations.* Bombay, 1960.; HIGGINS, R.: *The development of international law through the political organs of the United Nations.* London—New York—Toronto, 1963.; HIGGINS, R.: *The place of international law in the settlement of disputes by the Security Council.* American Journal of Internacional Law, 1/1970.; TAE JIN KAHNG: *Law, politics and the Security Council.* The Hague, 1964.; SCHACHTER, O.: *The quasi-judicial role of the Security Council and the General Assembly.* American Journal of International Law, 4/1964.

Council by virtue of Chapter VII of the Charter need not be in conformity with the rules of international law? The answer is negative as the opposite view would well result in the justification of arbitrary actions. The correct answer is the following: As it is emphasized in clause 2 of Article 24 of the Charter, "in discharging these duties the Security Council shall act in accordance with the purposes and principles of the United Nations". Still referring to cases coming under Chapter VII, the Council has the right, however, to disregard the rules of positive international law of not a mandatory character (e.g. international treaties etc.) *provided that same impeded an effective action aimed at securing peace.* With a different wording, it can be said that *the Council has to take political resolutions in accordance with international law but not bound to give an exclusively juridical response to the problems concerned.*

Nevertheless, it would be a mistake to conclude an underestimation of the role of international law from the above-said. As experience has shown a wide range of arguments based on international law has been used both by the parties concerned and the members of the Council when problems of any kind were discussed. As a matter of fact, this practice could not be followed without difficulties. Alternative approaches to a given problem taking into consideration international law in a way that, logically, it was difficult to refute any of the arguments, could be experienced not only in case of confrontations between the two different world systems but in connection with disputes between states belonging to the same group of state formations such as India and Pakistan as well. This is not to give a justification for all those who regard international law as nothing but a means of propaganda. On the contrary, international law has an objective corpus on the basis of which a correct answer to a given problem can be always formed. At the same time, it has to be admitted that, when making recourse to international law, it is not always possible to find an unbiassed and clear response to the complex phenomena of a complicated international situation in every given case, as this is borne out by examples in the field of internal law.

Nevertheless, the importance of international law is manifested first and foremost by establishing a "common language" between the parties contesting the views of each other. International law has been applied not only to contest the point of view of the opposite party but before, when a decision has to be taken concerning a basic problem i.e. the competence or lack of competence of the United Nations to proceed in the case in question. In view of the above-said, problems of international law in connection with the activity of the Security Council usually belong to any of the following three categories: decision concerning competence, choosing the appropriate way of procedure, and problems connected with the rights and obligations of the parties concerned.

The Security Council is not a judicial body set up to give a purely juri-

dical response to a problem submitted to it. The members of the Council are the representatives of states. As regards states, however, their attitudes and policies are determined by a number of important circumstances, and international law does not always have a decisive role among them, depending on the general policy of the state concerned. As a result, the Council as a whole is very rarely in a position in which it can put into shape an unequivocal and definite legal view in a given case. It is for this reason that, in the majority of cases, the Council prefers to restore the "*status quo ante*" establishing the "*status iuris*".

This attitude is explained in the relevant Western literature, among other points, by the argument that it offers major chances to the efficient and pacific settlement of the problems in question. True, a branding or the statement of responsibility under international law may well produce a reaction from the state concerned. This is the reason for which the expression "deplore" is used instead of "condemn" by the Security Council, even if a resolution is otherwise unequivocally against, say, a repressive action taken by Israel against an Arab state. It should be clear, however, that emphasis is laid even in a such case not on juridical nuances but on the circumstance that, in the case mentioned above, the United States would not accept a resolution "condemning" Israel. In view of the above-said, one cannot agree with the view according to which an overall "verdict" of international law would be only accepted by the Security Council if there were no hope whatsoever to make the attitude of a state violation international law changed. The Republic of South Africa, Southern Rhodesia, and Portugal are mentioned as examples.[5] It seems, however, that the overestimation of legal forms would be an incorrect view in this case too. In fact, the point is that the supporters of the said states are no longer in a position, under the influence of international public opinion, to prevent the condemnation of apartheid or colonial systems.

Summing up what has been set forth, it can be stated that *the Security Council, being essentially a political body, applies international law only as a subsidiary device but makes use of it at the same time as an important means.* As a rule, cases have been considered from the point of view of international law by the Council itself, i.e. it occurred very rarely that the Council approached the International Court of Justice or invited the parties to do so. Furthermore, the view according to which the resolutions of the Council should be submitted to the International Court of Justice for some sort of "judicial review"[6] is not confirmed either by the Charter or by practice.

For the relationship between the activity of the Security Council and the application of international law, the most important point continues to be that

[5] SCHACHTER: op. cit.

[6] KAPLAN, M. A.—KATZENBACH, N. DE: *The political foundations of International Law.* New York—London, 1961. p. 306.

the Council, as a body set up to guarantee collective security, is destined to secure the fundamental principles of modern international law, such as the prohibition of the use of force, the obligation of the pacific settlement of disputes, sovereign equality, and the furthering the enforcement thereof. As for the efficient application of the positive rules of international law both in the past and in the future, it was, and will be, practicable if the Council complied, and will comply, with the tasks conferred upon it in Chapter VI of the Charter, i.e. contributes efficiently to the pacific settlement of disputes.

2. The role of the Security Council in the formation, application, and development of the rules of international law

The thorough investigation of the role of international organizations in the process of the formation of the rules of international law dates back only to the last years. The present Chapter makes an attempt to give a description of the role of the Security Council in this field, based on the analysis of both the relevant literature of international law, and the practice of the Council.

It is an almost completely uniform view of the relevant literature, both socialist and western, even if with very slight differences, that international organizations have an important role in the formation of the rules of international law. H. BOKOR-SZEGŐ gives the following summary in a study dealing with this particular problem: "Investigating the role of international organizations in the process of formation of the general rules of international law, the conclusion will not be the revision of the existing system of the sources of international law, as the activity of international organizations does not include accomplished legislation in the formation of the general rules of international law. Nevertheless, their actual role in this process is much more than promoting legislation; even if not with as much importance as international treaties in force and customary law enjoy, the stand taken by international organizations . . . influences the attitude of states. For this reason, when pre-estimating some reactions of states to be expected in their international relations, not only the results of accomplished law-making i.e. international treaties and the rules of customary law but, as a decisive factor, also the activity of international organizations have to be taken into consideration."[7]

Agreeing with the above cited statement, I consider it as the purpose of this paper to make clear the place and role of the Security Council within the general process. To put it more clearly: it should be examined whether the Security Council has a role at all in the formation and development of the general and special rules of international law.

[7] BOKOR-SZEGŐ, H.: *A nemzetközi szervezetek szerepe a nemzetközi jogi normák kialakulásának folyamatában* (Role of the international organizations in the process of formation of the rules of international law). Állam- és Jogtudomány, XIII/3. p. 438., and also pp. 423—439.

a) *Views and conclusions of the relevant literature on the legislative activity of the Security Council*

H. Bokor-Szegő, dealing with this problem in the most thorough way in the Hungarian literature of international law, points out first that competence under Chapter VII of the Charter gives no basis for a legislative activity, but only for issuing dispositions binding states, i.e. for a law-applying activity. At the same time, the functions carried out by virtue of Chapter VII of the Charter *contribute* (author's italics) to the formation of general rules of international law by means of customary law.[8]

Mrs. Bokor's views correspond, besides, to the views of several other international lawyers mainly in socialist countries. Taking thus G. Tunkin's work "Theory of International Law", the following view is expressed, both in its first and second edition: "The resolutions in question (i.e. those taken by virtue of Chapter VII) are, however, executive measures by their nature, not destined to be general rules of behaviour."[9]

Tunkin criticizes Professor D. B. Levin who, admitting first that the resolutions of the Council "have not the force of legal precedents, nor the authority to produce any kind of a general rule of international law", is later in his work of the opinion that "the resolutions concerned are, in principle, not different from multilateral international agreements".[10] Later in his now-cited work, Professor Tunkin points out that the resolutions of the Security Council (presumably those beyond the field of application of Chapter VII, although not referred to explicitly) may contribute in general first to the shaping of international practice and, second, to the process of formation of the customary rules of international law. According to this view, "this kind of importance of the resolutions of the Security Council goes beyond the frames of the Charter of the UN, being thus in the field of formation of the customary rules of international law."[11] It is not clear, however, in what does this additional importance go beyond the frames of the Charter. In my opinion this highly important activity of the Council has been in conformity with the intentions of the Charter, even if "the final result" appears in customary law i.e. another element of the sources of international law.

Traian Ionesco, a well-known Rumanian international lawyer, confines his views to state that the resolutions of the Security Council do not produce new law. He is reluctant even to recognize what is accepted by Tunkin i.e. that

[8] Bokor-Szegő: op. cit. p. 436.

[9] Tunkin: *A nemzetközi jog elméletének kérdései* (Problems of the theory of international law). Budapest, 1963. p. 130. The same in the second edition, published in Russian: (Theory of International Law). Moscow, 1970. p. 195.

[10] Cf. Tunkin: op. cit. (1963), p. 131. Levin's criticism is not included in the second edition.

[11] Tunkin: op. cit. (1963), p. 132.

the resolutions mean a contribution to the progressive development of international law; all what is emphasized by him is that, regarding actual cases, it is a matter of law application.[12]

K. SKUBISZEWSKI, a Polish jurist, also refers only to the executive measures of the resolutions of the Council, without giving his reasons, and presumably accepting Tunkin's views. Nevertheless, it is explained in more details in another part of his work, that, as the addressees of the resolutions taken by virtue of Chapter VII always change, depending on actual cases, and the same changes are characteristic for the rules of conduct, shaped for changing conditions, it is more correct to regard the resolutions in question as international administrative acts.[13]

Similarly, ALEKSANDR IANKOV, a well-known Bulgarian scholar of international law, comes to the conclusion that the resolutions of the Security Council do not produce rules of international law and have only the character of executive measures.[14]

It is Professor MANFRED LACHS, the Polish President of the International Court of Justice who, when comparing his opinion with the views now mentioned, adopts a somewhat different stand among socialist international lawyers. According to Professor LACHS, the contribution of the international organizations to the development of international law consists first and foremost in the strengthening, concretizing, making more precise, and modernizing the existing legal rules. At the same time, some kinds of resolutions e.g. those of the Security Council or the International Court of Justice, produce rights or obligations in particular cases. Professor Lachs draws attention, however, to the circumstance that, essentially and as a whole, the resolutions or recommendations concerned are to be regarded principally as "preliminary measures". It is the overall activity of the international organizations that has to be considered as promoting the way of the formation of binding rules of international law. The arguments of Professor Lachs are weakened, however, by the fact that he fails to mention concrete examples to support the said opinion, at least in connection with the Security Council.[15]

[12] IONESCO, T.: *Le rôle des organisations internationales et, plus récemment, de l'ONU, en ce qui concerne le développement du droit international.* Revue Roumaine des Sciences Sociales, Sciences Juridiques. 2/1965 pp. 211—212.

[13] SKUBISZEWSKI, K.: *Forms of participation of international organizations in the law-making process.* International Organizations 1964. No. 4. 800. p.; also *Enactment of International Law,* 1965—1966. p. 202.

[14] IANKOV, A.: *Organizacija na Objedenite Nacii* (The United Nations Organization). Sofia, 1965. 191 p.

[15] »Dans des cas particuliers les décisions elles-mêmes sont créatrices de droits et obligatoires, comme au Conseil de Sécurité ou à la Cour Internationale de Justice. Mais en principe les résolutions et recommendations adoptées au sein des organisations internationales représentent une mesure préliminaire. C'est leur activité accumulée pendant des années qui fraie la voie vers la formation des documents internationaux obligatoires.« LACHS, M.: *Le rôle des organisations internationales dans la formation du droit international.* Mélanges offerts à Henri Rolin. Paris, 1964. pp. 157—170; in particular p. 1969.

Lastly, reference should be made to the views of two Soviet authors in which the opinion as inferred from the Soviet literature of international law is summed up as follows:

It is stated first that, as it is revealed from the conclusion that can be drawn from the works and the theoretical studies of Soviet scholars, the organs of the UN, including the Security Council, have not, and cannot have functions involving some sort of legislative or "supranational" powers, i.e. they have been set up in order to carry out their activity within the frames determined by the Charter, the constitutional basis of the UN.[16] Besides, emphasis is laid on the point "It has to be also noted that some resolutions of the Security Council, adopted in accordance with the Charter, are in some cases not only instructions to be executed with a binding force for the members of the UN, but also legal acts that may play a given role in the process of the formation of rules".[17]

The role of the Security Council in the formation of rules has not been dealt with thoroughly in the western literature of international law either.

In the second edition of his work "Principles of International Law", H. KELSEN only states, without giving fuller explanation, that "under the Charter of the United Nations, the General Assembly as well as the Security Council has a restricted legislative power".[18]

In Kelsen's work "Law of the United Nations" two interesting tenets are set forth. First, the resolutions of the Council need not necessarily accord with positive law, as the main purpose is to maintain international peace and security. Exception is made, however, for cases when, by virtue of paragraph 2 of Article 94, the Council adopts resolutions in order to execute a judgment of the International Court of Justice. In the other significant remark, equally without a more detailed explication, Kelsen points out that the Security Council may create new law in given cases i.e. executing its own resolution.[19]

In E. YEMIN's work, dealing with the legislative power of the UN and its specialized agencies only the measures are enumerated that may be taken by the Security Council by virtue of Chapter VII of the Charter. According to the author's view, the Council is thus authorized to lay down general rules of conduct, with binding force for the members of the UN.[20] He adds, however, that the afore-mentioned are only of theoretical significance, as com-

[16] Федоров, В. Н.—Ефимов, Г. К.: ООН и поддержание международного мира (The UN and the maintenance of international peace). Moscow, 1969. p. 17.

[17] FEDOROV—JEFIMOV: op. cit. pp. 20—21.

[18] KELSEN, H.: *Principles of international law.* The John Hopkins University 1967. 2nd ed. p. 507.

[19] "The decision enforced by the Security Council may create new law for the concrete case." KELSEN: *The law of the United Nations.* London, 1950. pp. 294—295.

[20] YEMIN, E.: *Legislative powers in the United Nations and Specialized Agencies.* Leyden, 1969. p. 23.

pulsory measures, under Chapter VII, were not taken as yet.[21] The relationship between the formation of the rules of international law through customary law and the resolutions of the Council are not mentioned.

In his lecture on the nature of the resolutions of international organizations as sources of law, at the Academy of the Hague, TAMMES, a Dutch international lawyer restricted his discussion to saying that the resolutions of the Council constituted strict legal obligations for member states.[22]

It is interesting to note that the role of the Security Council in question is not dealt with at all by J. CASTAÑEDA, in his thoroughgoing study of similar character.[23]

It is ROSALYN HIGGINS who dealt with the law-making role of the Security Council in the most thoroughgoing way in the relevant literature of western authors.[24]

First of all, it is set forth by HIGGINS that the resolutions taken by virtue of Chapter VII have a legislative character, as they are equally binding not only on the members of the Council but on all member states, irrespective of their agreement or disagreement. She is against the view making a distinction between resolutions creating "law", or producing only "obligations". According to her opinion, any act entailing legal consequences makes part of the law-making process. Besides, the organs of the United Nations, including, of course, the Security Council, contribute to the development of international law by means of the continuous interpretation of the Charter. This activity is placed on the borderline between customary law and the law of treaties.[25]

In the overwhelming majority of cases, the Council interprets the general principles of international law involved, such as the prohibition of the use of force, self-defence, and domestic jurisdiction. Besides, the author notes that, although the role of the "*opinio iuris*" continues to be important in the process concerned, a consent brought about in the Security Council may lead to the formation of a new legal rule covering much shorter time than it used to be in the period of the "classic" international law.[26]

[21] The resolutions of the Council related to the Korean war were regarded by Yemin to be not of this nature for the only reason that they had the character of recommendations. It should be added to this remark that the resolutions of the Council taken in connection with Southern Rhodesia are already of the character that they are subjected to the rules of Chapter VII. See also Resolution No. 253/29.5. 1969 of the Security Council.

[22] "...decisions creating strict legal obligations for Members". TAMMES, A. J. P.: *Decisions of international organs as a source of international law.* Recueil des Cours. 1958. II, p. 317.

[23] CASTAÑEDA, J.: *Valeur juridique des résolutions des Nations Unies.* Recueil des Cours, 1970. I.

[24] HIGGINS: *The United Nations and law-making: The political organs.*

[25] " . . . a twilight area of customary and treaty law. Within the United Nations the traditionally distinct sources of treaty and custom become fused." HIGGINS: op. cit. p. 44.

[26] HIGGINS: op. cit. p. 45.

Nevertheless, it should be noted that there are views in the western literature as well according to which the Security Council has no legislative power. G. FITZMAURICE (UK), and PH. JESSUP (US), former judges of the International Court of Justice, should be mentioned in particular.

b) *Analysis of some resolutions of the Security Council, with respect to the formation and application of the rules of international law*

After having surveyed the views in the relevant literature, the resolutions of the Council as the most important sources should be examined. Apart from some remarks of more general character, the examples are taken from the second half of the sixties.

When analyzing the resolutions of the Council, the starting point should be that the documents concerned have always been related to the case in question, they are relatively short and, compared to the resolutions of the General Assembly, contain less statements of principle in their preambles. In particular, in the sixties the operative provisions of the resolutions have been increasingly in the nature of inviting, appealing to irrespective of what is concerned, such as an invitation to conclude armistice or to negotiate on disputes.

Starting from the view that, as a rule, the resolutions of the Council are of a law-applying nature and, besides, they render some established rules of the international law more precise, they *may contribute* partly, nevertheless, to the formation of new rules of international law as well. Accordingly, the resolutions now discussed should be divided into two groups.

There have been numerous important resolutions of the Security Council in which existing rules of international law were applied. Instead of giving a complete enumeration, it is sufficient to make reference to the following:

The ban on reprisal with the use of force has become an established rule of international law. Starting from the Charter of the UN, it results principally from the principle of the prohibition of the use of force, as defined in paragraph 4 of Article 2. The general adoption of the said principle was considerably facilitated, however, by the stand of the Security Council, repeatedly expressed its practical application.

An aggressive raid of British aircraft in 1964, and following a complaint submitted by Yemen, the "reprisals as incompatible with the purposes and principles of the UN" were condemned in paragraph 1 of the operative part of the relevant resolution of the Council.[27]

[27] Res. 188/1964. *Resolutions and Decisions of the Security Council.* 1964. (Referred to below: Resolutions . . . (year)). p. 10.

Upon a complaint of Jordan, and recalling her earlier stands, in paragraph 3 of the operative part of the resolution concerned of the Council in 1966, Israel's attention was drawn to the point that repressive military actions were impermissible; for the case of a repeated recourse to them, the Security Council held out the prospect of further and more efficient measures to be taken.[28] Similarly, repressive actions were condemned by the Council in 1968, following a confrontation that took place between Jordan and Israel.[29]

In the well-known resolution of November 22, 1967, related to the Middle East crisis, the principles of the inadmissibility of the acquisition of land by the use of force and the liberty of shipping have been emphasized.[30] Upon a complaint submitted by the Congo, all states tolerating or permitting the recruitment of mercenaries or rendering assistance for them with a view to overthrow the government concerned were condemned.[31] Clearly, this meant the application of the principle of non-intervention. Being related equally to the Congo, in a resolution taken on December 30, 1964, and making reference to Article 52 of the Charter, the role of the regional organizations, and of the Organization of African Unity in particular, is emphasized they should have in securing pacific settlements.[32]

Making reference to fundamental humanitarian principles, the Council drew the attention of the governments concerned, in June, 1967, to the respect of the Geneva conventions of 1949, relating to prisoners of war and the protection of civilian population in time of war. In the same resolution, Israel was invited particularly to secure the safety of the population of the areas where military operations have taken place (i.e. occupied areas), and to make possible the return of refugees.[33] It should be noted in this respect that, although the resolution in question cannot be regarded as a compulsory measure taken by virtue of Chapter VII, it provided for a concrete obligation in the latter case.

As a matter of fact, there are numerous other resolutions of this category in which references are made to the most common principles of international law such as those of the inviolability of territorial integrity, the ban on the use of force, the prohibition of intervention etc. Being widely known, the enumeration of further examples seems to be unnecessary.

The resolutions analyzed in the following *may influence the formation of the rules of international law to some extent.* As far as the examined period is concerned, the resolutions in question have been related to human rights, the elimination of racial discrimination, and the abolition of the colonial system. Within this group, the resolutions condemning the *apartheid* system

[28] Res. 228/1966/1. Resolutions 1966. p. 11.
[29] Res. 248/1968/1. Resolutions 1968. p. 8.
[30] Res. 242/1967. Resolutions 1967. p. 8.
[31] Res. 239/1967. Resolutions 1967. p. 13.
[32] Res. 199/1964. Resolutions 1964, p. 19.
[33] Res. 237/1967. Resolutions 1967. p. 5.

may have a major importance. In its resolution adopted on June 14, 1964, the Council "condemns the *apartheid* policies of the Government of the Republic of South Africa and the legislation supporting these policies . . ." In paragraph 4/c, the resolution contains an urgent appeal to the government "to abolish the practice of imprisonment without charges, without access to counsel or without the right of prompt trial".[34]

In another resolution, the Council condemned repeatedly the criminal procedures taking place in the Republic of South Africa "instituted within the framework of the arbitrary laws of *apartheid* . ."[35]

Dealing with the resolutions of the Council taken in connection with *apartheid*, the problem arises whether it was an appropriate choice to take this example, as apartheid is, essentially, a racial discrimination, and any kind of racial discrimination is prohibited under the Charter. It could be thus said that the Council did no more than to apply the Charter as a legal rule.

No doubt, apartheid is prohibited in general under international law, starting from the Charter. The prohibition of apartheid is not mentioned, however, in the Charter explicitly, and it is known that the Republic of South Africa, as an original member of the United Nations, still refuses to accept this obligation. It should be recalled, too, that the Special Political Committee was charged by the General Assembly of the UN to discuss the problem of apartheid, instead of the Committee of Social, Humanitarian, and Cultural Questions, competent principally for problems connected with human rights. One may thus consider factors by which, taking the case of apartheid, the general rule embodied in the Charter became more precise and more easily acceptable for the community of states. The acceptance of two international covenants related to human rights in 1966 was an act of this kind; it should be noted, nevertheless, that these instruments have not yet come into force. Thus, apart the resolutions of the General Assembly which can only be recommendations, the resolutions of the Security Council must have played an important role in this process. In this respect, it is worth to draw attention to a decision of the International Court of Justice on South West Africa, taken in 1966, which did not enhance the authority of the Court. Ethiopia and Liberia, the two African states which approached the Court, dealt particularly with the legal basis and the character of the obligations of South Africa in their reply submitted to the Court in response to the objections of SouthAfrica. Apart from the references made in the said document to the Charter of the UN, the Universal Declaration of Human Rights, and the relevant resolutions of the General Assembly, *three resolutions of the Security Council, condemning apartheid and taken prior to the acceptance of the afore-mentioned international*

[34] Res. 191/1964. Resolutions 1964, p. 14.
[35] Res. 190/1964. Resolutions 1964, p. 13.

covenants were cited in a separate item.[36] It is worth mentioning that Judge Van Wyck, *ad hoc* delegate by the Republic of South Africa, when rejecting the opinion mentioned to above, hinted ironically in the Court to the "novel proposition that the organs of the UN possessed some sort of legislative competence".[37] Remaining still within the complex of problems in question, another resolution of the Council, on South West Africa (Namibia), should be recalled in which, making reference to the violation of the Universal Declaration of Human Rights, it condemned the government of the Republic of South Africa. [38]

By its resolution of August 12, 1969, adopted also in connection with Namibia, the Council contributed beyond any doubt to the universal acceptance of an evolving legal rule by confirming the legitimacy of liberation fights.[39]

Regarding the resolutions adopted in connection with Southern Rhodesia, it is worth to draw particular attention to the fact that, following the unilateral declaration of independence, the Security Council "condemns the usurpation of power by a racist settler minority" and "calls upon all States not to recognize this illegal authority".[40]

Another example can be taken from the complex of the Near East crisis, demonstrating that the resolutions of the Council conferred some right and obligations upon the states. Thus, in resolution No. 252/1968 of the Security Council an earlier resolution taken by the General Assembly was confirmed, according to which the status of Jerusalem could not be altered by the legislative and administrative measures of Israel as Jordan had certain title for the old town of Jerusalem.

As regards the resolutions taken against Portugal, the one dating from November 23, 1965, is worth mentioning. (Characteristic to note, the following states abstained from voting for the motion: France, the Netherlands, the United Kingdom and the United States.) The resolution took a position in several matters of importance. Thus Portugal was condemned for refusing to recognize the right for self-determination of peoples living in its territories, and she was invited to grant an unconditional political amnesty and to make possible the activity of political parties. The states concerned were requested to abstain from the supply of arms or war materials that Portugal could utilize in her colonial territories.[41]

[36] South West Africa Cases, Pleadings . . . 1966. Vol. IV. pp. 503—504.
[37] South Africa Cases. Reports . . . 1966. p. 170.
[38] Res. 246/1968. Resolutions 1968, p. 2.
[39] «4. Reconnaît la légitimité de la lutte du peuple namibien contre la présence illégale des autorités sud-africaines dans le Territoire;" Rés. 269/1959, Résolutions 1969, p. 2.
[40] "Condemns the usurpation of power by a racist settler minority . . . calls upon all States not to recognize this illegal authority . . . " Res. 217/1965. Resolutions 1965, pp. 8—9.
[41] Res. 218/1965. Resolutions 1965, pp. 18—19.

c) *Conclusions*

As no judicial or jurisdictional power has been conferred upon the Security Council under the Charter, it was not granted *deliberately* a *legislative power* either. *By virtue of its function, the Security Council has no power to constitute general rules of international law which, in a generalized form, would be destined to lay down rules of conduct binding for any future case.* It is thus beyond doubt that the resolutions bearing upon given cases have been, as a rule, instructions to be executed, in case that they are within the field of application of Chapter VII, or recommendations, if competence under Chapter VI is involved.

Even this kind of resolution may acquire, however, the character of a legal source under given conditions and in an indirect way, by virtue of its force creating a precedent for the future. This is to be understood, first, that a reference to resolutions taken earlier has been a frequently used means of the presentation of the political and legal demands of the state concerned. As for the Council, it has taken into consideration the principles laid down in former resolutions and the adopted measures as well, when a given case was being judged. Nevertheless, the formation of only a special and never of a general rule of international law may come into question in such cases.

As a matter of fact, the character of a "quasi-source" of law of the resolutions concerned, based on precedents, has been acknowledged principally by jurists working in areas in which the Anglo-Saxon system of law is predominant. On account of the well-known relevant views, international lawyers in socialist countries are much more reluctant to accept the character of a source of law of the measures in question. For this reason, Tunkin's opinion according to which "the resolutions of the Security Council . . . may represent a phase determined this way in the process of the formation of the rules of international law by customary law" reflects a fairly careful wording. The more, he adds the following to the precited remark: "The formation of a rule of conduct does not result, however, from practice in any case, and an established rule of conduct does not become necessarily a legal rule."[42] As for the views of H. Bokor-Szegő on the resolutions of the Security Council, she states that "they contribute to the formation of general rules of international law by means of customary law".[43]

Our standpoint should be made clear also concerning the problem whether the resolutions taken by virtue of Chapter VII of the Charter have to be regarded definitely as executive measures. In my opinion, this was the original idea contained in the Charter. In view of the cases of new development it seems, however, that the compulsory measures in question may include

[42] Tunkin: op. cit. (1963) p. 132.
[43] H. Bokor-Szegő: op. cit. p. 436.

not only actions affecting the originally supposed agressor but a special legal relationship between the Security Council and a particular member state or a group of member states as well. Thus the United Kingdom was invited by the Security Council, in connection with the South Rhodesian crisis, to prevent the supply of Southern Rhodesia with oil by oil tankers, including the use of force. The United Kingdom was also authorized to bring to standstill and to take into custody the tanker Joanna V. after unloading.[44] The said resolution was thus for a substitute the agreement to be concluded by virtue of Article 43, in which dispositions should have been made concerning the placing at disposal of the required armed forces. Yet, it has been unquestionable that the agreements concluded by virtue of Article 43 have been regarded as international treaties, being thus the sources of international law. According to FAWCETT, this was un unlawful decision as it was disputed whether it could be regarded as a compulsory measure taken by virtue of Chapter VII. Besides, he was of the opinion that it violated the principle of the liberty of shipping on the high seas, unless Article 22 of the Geneva Convention on the High Seas was applied to this action.[45]

It is still a point to be investigated whether the Council is authorized to create a special rule of international law i.e. a relationship under international law in which rights and obligations are determined only in connection with a particular case.

First of all, it has to be stated that, for the time being at least, the problem has much more a theoretical character, as the resolutions of the Council in this field did not get realized in practice. The resolutions of the Council bearing upon the Free Zone of Trieste, taken in connection with the peace treaty concluded with Italy in 1947, and conferring special powers on the Council, can be placed in this group too. By giving a "binding force" to former resolutions of the General Assembly, bearing upon the legal status of Jerusalem, the resolution of the Security Council concerned can be included in the said category as well. Essentially, the resolution connected with Southern Rhodesia, mentioned above, belongs also to this category. Opposing the hesitation prevailing in this field, in the author's view *the Council can reach exceptionally, the stage of accomplished legislation if the formation of a special rule of international law is concerned.* With a special view to the future, it can be expected that, supposing an increasing readiness of co-operation of the permanent members, a resolution of the Council will be, in a given case, not simply an instruction to be executed, but the pronouncement of a new rule of special character. A Soviet proposal, submitted in the course of the XXVIIth session of the General Assembly, was related to this development. According

[44] Res. 221/1966. Resolutions 1966. p. 5.

[45] FAWCETT, J. E. S.: *Security Council Resolutions on Rhodesia.* British Yearbook of International Law 1965—1966. pp. 118—121.

to the said proposal, the Security Council should confer binding force to the resolution of the General Assembly which would provide for the banning of the use of nuclear arms for ever.

As regards the place of the resolutions of the Council within the system of legal sources, they apply beyond doubt first and foremost the Charter as an internatonal treaty; at the same time, they are bound, however, to promote the formation and development of rules of customary law. The opinion of R. Higgins, according to which, essentially, the resolutions concerned are placed on the borderline of both systems of legal sources, seems to be convincing. With this in view, it should be emphasized repeatedly how difficult it is in this field to make a precise delimitation between the formation of a completely new rule of international law, the development of an established rule, and the interpretation of treaties, respectively. In this respect, I agree with the opinion of H. Bokor-Szegő cited below, adding that her views on international organizations are applicable to the Security Council as well: "*Just in the activity of international organizations, the interrelationship between the two sources of international law, i.e. international treaties and customary law, appears to be completely evident.* (Author's italics.) On the basis of established general rules of customary law, international treaties used to be elaborated, as a rule, within a short time, as far as the international organizations are concerned, and the dispositions of the accepted treaties may well enjoy general recognition gradually, leading to a universal character."[46] It should be added, however, that the international organizations have been furthering not only the said "interrelationship" but, first and foremost, the elaboration and conclusion of treaties. Although an activity of this kind has not been included in the functioning of the Security Council, as it is principally the task of diplomatic conferences convened by the General Assembly, the Council has been contributed, as it was demonstrated, to the development of international law in other aspects very considerably.

[46] Bokor-Szegő: *A szokásjog helye a mai nemzetközi jogban.* (The place of customary law in contemporary international law.) Állam- és Jogtudomány, 4/1971. p. 660.

Le Conseil de Sécurité et le droit international

par

Á. PRANDLER

L'étude définit d'abord, d'une façon générale, la place et le rôle revenant au droit international aux travaux du Conseil de Sécurité. Elle constate que le Conseil est, en premier lieu, une institution politique. Les décisions prises par le Conseil doivent, pourtant, être en harmonie avec le droit international, même si ce n'est pas leur tâche de donner des solutions exclusivement juridiques au cas donné.

Les décisions doivent correspondre aux buts et aux principes de l'ONU; néanmoins dans des questions appartenant à la sphère du VII[e] chapître de la Charte, le Conseil peut passer outre aux dispositions du droit international positif au cas où ces dispositions empêchaient des mesures efficaces pour sauvegarder la paix.

La deuxième partie de l'étude s'occupe du rôle du Conseil de Sécurité joué dans le domaine de l'application, de la formation, et du développement des normes du droit international.

Après avoir analysé les décisions prises par le Conseil et la litérature juridique, l'auteur constate ce qui suit: les décisions du Conseil de Sécurité sont dans leur majorité, des instructions à exécuter. En même temps beaucoup parmi ces décisions contribuent à la formation et au développement des normes générales du droit international. Il n'est pourtant pas exclu, en principe, qu'au cas de normes spéciales du droit international la décision du Conseil arrive même à l'échelon de la création accomplie du droit.

Совет Безопасности и международное право

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В статье прежде всего определены в общем виде место и роль международного права в работе Совета Безопасности. Автор устанавливает, что Совет Безопасности первично является политическим учреждением. Решения Совета, однако, должны соответствовать международному праву, но тогда же их задача не сводится на то, чтобы дать исключительный правовой ответ на поставленные вопросы. Решения должны соответствовать целям и принципам ООН, тогда же по вопросам, указанным в главе VII Устава Совет Безопасности имеет право обойти отдельные нормы обязательного международного права, поскольку эти нормы препятствовали бы действенным мероприятиям в интересах обеспечения мира. Во второй части статья занимается ролью Совета Безопасности в применении, создании и развитии норм международного права. На основании анализа юридической литературы и решений Совета Безопасности автор устанавливает, что большинство решений Совета Безопасности — это обязательные к исполнению указания. Тогда же целый ряд решений способствует сложению и развитию норм общего международного права. В принципе не исключено, что в случае специальных норм международного права решение Совета Безопасности может дойти до окончательной стадии правотворчества.

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Split in the Development of the Positions of Tortfeasor and Injured Party

(Outline)

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Section 1 presents the classic proportions of the liability in general called *subjective* and relying on specific tort (which involves full damages) as embodying *the balance of the positions of tortfeasor and injured person.* Subjective liability combines liability and damages in a way that a perfect harmony will be established with the principle of maintenance of the *balance of interests* so characteristic of liberal capitalism and with the antagonistic relations between the material scale of values of the bourgeoisie and its moral exigencies. This construction has been embodied, with fair approximation, by the Code Civil. However, in the field of practice its transformation set in immediately. Notwithstanding in general consciousness this model stands for the just compensation of damages.

The career of the position of the tortfeasor through the stages of objectivization, the emergence from the direct relations of the compensation of damages, individualized secondary or subsidiary liability, reflects the primary safeguard of the interests of the injured party (Section 2). The assertion of individual objective liability was based upon motives for the obligation of compensation out of liability. *Liability insurance* adapts the contents of the tortfeasor's liability to the insurer actually accepting liability. At the terminal point of development the tortfeasor disappears from the sphere of tort. Exaggeratedly expanded insurance, on the other hand, again brings to the surface considerations of liability in the relations between insurer and tortfeasor. The specific path of the tortfeasor means the "channelling" of liability, which strictly speaking is the projection of liability on a risk basis to the internal relations of the tortfeasor's side.

The trend in the *position of the injured party* (Section 3) again presents a change in its underlying principle: owing to the preponderance of the interest attached to the compensation of damages the principle of *casum sentit dominus* and the correlations of shifting the loss, do not prevail in their original forms and ratios. The preponderance of the injured party's interest will be realized in the equity of the administration of justice. While passing from the sphere of the principle of *casum sentit dominus* to the territory of liability the means of the safeguard of the injured person's interests detach the position of the injured person from liability, and the deploying of the social functions of the State change this liability into a less and less special channel of the care for the injured.

By the side of the systems of liability of the socialist civil laws gradually built up by the beginning of the sixties, the tightening of liability goes on in practice so to say unnoticed, and the problems referred to gradually fade away from the sight of the theory emphasizing the preventive aspects of liability. Recent developments call attention to the civil law safeguard of the interests of the injured party. Here the position taken by Hungarian law appears to be a realistic one: it maintains the principle of liability, however, as far as it is possible smoothes the path of a distribution of damage.

1. *The classical balance of positions.* While outlining the development of civil law liability one sets out as a rule from a category called subjective and based upon reprehensible negligence of typified criteria, whose sanction is the

full compensation of damages. This construction of liability has already been called above one of *classic proportions*. For several reasons it deserves this epithet. First and fundamentally because in this form of liability capitalist production relations, as the relations and ideology of a commodity producing society, are reflected in a complex form. Any other "merits" in the one way or the other stand together on this understanding. Thus e.g. the earlier casuist theory has been replaced by a uniform rule, namely the roots of civil law liability extending into criminal law have been cut off, etc. These many small steps made from as many sides have in their totality led to a qualitative change. We shall therefore leave open the question of antecedents (namely the question of the historical development and assertion of the particular elements and archetypes, mainly the correctly or "superficially" regarded adoption and development of these[1]). Liability for damages in its given and by no means accidental form tied up the material value scale of the classical system of commodity turnover (the case being one of an institution of law uniformly prevailing in society as a whole), with a system of responsibility originating in the moral sphere — and could only do so — in a way that it maintained the semblance of morality. However, in reality it adapted this system in the strictest meaning of the term to an abstract individual and not to a real human being. In this formula we may already discover the "classical" compliance of this liability with the given social conditions. *Civil law liability will never be its own unless it combines liability and the compensation of damages in an equivalent and inseparable form: either side can come about only through the other. And for that matter these two do not necessarily postulate each other:* their social ends may be achieved on different paths. The historically developed potentialities for unification could lead to fulfilment and consolidation in the law of liability only because an institution of law of this kind is in perfect harmony with the actual conditions of the economic and moral spheres.

Bourgeois society put an end to the organic community character of earlier societies and their place was taken by "personal independence based on material dependence".[2] Human community was replaced by the "community of commodities", where beyond the self-interested realization of exchange the individuals are indifferent to one another. The State has ceased to operate as a community, "the political man is only an abstract, artificial man, as an *allegorical, moral person.*"[3] On this soil the "moral of national economy" i. e.

[1] See MARTON, G.: *Kártérítési kötelmek jogellenes magatartásból* (Obligation of damages arising from tortfeasance). SZLADITS, K.: (ed.) *Magyar magánjog* (Hungarian private law). Vol. IV. Budapest, 1942. p. 793.

[2] MARX: *The critique of political economy* (Hungarian translation). MEM Vol. 46/1. Budapest, 1972. p. 75. The following discussions in the first place set out from the analysis of F. FEHÉR: *Az antinómiák költője* (The poet of the antinomies). A monograph on Dostoyevsky. Budapest, 1972. In particular the Chapter: The crisis of the individual.

[3] MARX: *The jewish Problem* (Hungarian translation). MEM, vol. I, Budapest, 1957. p. 370.

antinomically detaches itself from the scale of values of the goods the moral scale of values which tends to become more and more an exceptional human achievement. The practical resolution and product of the contradiction is the *convention*, as a substitute for morals: i.e. the collection of customs controlling individual action, which embodies the scale of values of goods, yet comes forward with a pretence to pure moral values.[4] *The logical contradiction, which is the characteristic feature of classical civil law liability, is also the expression of this social contradiction.*

The description of this process, in a generalized form and from a definite point of view, cannot as a matter of course, be applied directly to the development of law. Ultimate compliance does not render unnecessary the exploration of the factors which in a given legal system have led to the given concrete regulation, notable factors such as economic, political, philosophic, etc. influences. The demonstration of these factors is not, however, the purpose of the present paper, nor would such a demonstration effect changes on the correlation here discussed. *From the ideological point of view civil law liability based on objectivized fault is but the legal reflection of the "convention".*

With regard to civil law liability the implantation of bartering relations was of vital importance: "there must be reparation, this being the due of the injured party, deriving simply from the injury."[5] This thesis involved the rule of full compensation of damages.[6] All these appeare in the cloak of the liabiliy of individuals of free will.[7] Individual liability is here merely a mask: commodity relations constituting the direct object of liability permit the presentation of the individual only in the form in which he appears in the bartering relations,

[4] *Cf.* FEHÉR: op. cit. pp. 19—26.

[5] MARTON: op. cit. p. 793, points out that this "individualistic fundamental attitude" was strong to an extent that the theory of private law "confronted" the intellectual struggles which in criminal law were carried on in problems of the essence and foundations of punishment "in a cold manner, mute and perplexed", while it adhered to its own "delictual" doctrine of tort.

[6] VILÁGHY not only derives full damages from bartering relations, but according to him the standards of average culpability also follows from the volitional character of bartering relations. In his opinion here commodity relations operate the other way round: they connect the parties in the sign of sanctions and the subjective element of entering into bartering relations plays a central role, however, with the opposite sign: this is the reason why liability is subjective. (*Áruviszony és polgári jog* – Commodity relations and civil law.- Állam- és Jogtudomány, 1968. pp. 465, 471). For our part we agree with A. HARMATHY according to whom "Only the degree of sanctions follow directly from commodity relations and the exchange of commidities . . . beyond this, however, there is no direct definiteness." (*A szerződéses felelősség rendszere és a közreműködőért való felelősség* – The system of contractual liability and liability for the contributor) Állam- és Jogtudomány, 1972. p. 477.) From the motives of the BGB (MUGDAN, p. 10) it appears that its makers have regarded the adjustment of the extent of liability to the culpability as incompatible with the civil law nature of the sanction.

[7] The passage in the report of BERTRAND DE GREUILLE one of the drafters of the Code civil that "it is one of the principles of society that the individual is liable for his acts, therefore the acts must always be judged on the ground of the psychic characteristic." Quoted by MAZEAUD—TUNC: *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle.* Paris, 1957. I. p. 54.

viz. as the standardized figure of transactions. Subjectively (though with a spurious consciousness) the bourgeois could identify himself with this thesis, in fact he took part in the legal and political sphere on this understanding from the very outset.[8] The Buddenbrooks differed from the Hagenströms, or the "subjects" from the German bourgeois of 1848, not in the first place by their economic activities: in their age the Buddenbrooks could enforce the cruelty of accumulation only too well. Yet by their subjective moral pretensions they were others and more.

The further path of the development of civil law liability on this general level, as tendency, originates in the tilt of the "equality" of the commodity relations and the partners, without, however, permitting the short-circuiting of the correlations. Still the ideology of commodity relations will operate until there are commodity relations and alienation, though it will not directly follow the changes occurring in the former. No wonder that this form of subjective liability has struck deep roots in the consciousness of the citizens and that they feel this construction as just and equitable. In liability freedom, in the standardization of culpability and the equal risk of damages depending on the culpability of the other party affording all or nothing, the echo of the great bourgeois illusions are present. Liberty, equality and fraternity are still living for many, although ages have passed since the French revolution.

This ideological compliance, which we have tried to outline, cannot cover up *the fundamental agreement which in the material sphere exists* between the commodity producing interest and the safeguard of interests brought about by this regulation of liability. As has already been made clear, the equivalent approach to the considerations of liability and damages provide no advantages for either party. The potential tort feasor could display his activities undisturbed within the limitations of average care (or negligence), while he could take it for granted that he should not pay for any damage caused lesser's negligence than this. On the other hand, the injured party could feel sure that in the *complete area of commodity relations embraced by civil law he would receive full compensation*, if the damage was caused by negligence in excess of the average.

All that has been set forth here must be attributed to the construction. However, as we examine the concrete realization, we shall find that only in the French *Code Civil provisions of law came close to this ideal.* In fact when the *Code Civil* was born, the position of the French bourgeoisie was also close to the ideal.[9] However, it should be remembered that not even the formal approximation of the ideal will of necessity stand for a balanced situation. As a matter of fact there are two evaluative elements in the system, viz. the average

[8] Here we have not in mind in the first place that man is as subject of civil law of necessarily the abstracted proprietor, but the "anthropological" aspect of the problem.

[9] See Eörsi, Gy.: *A burzsoá magánjogi rendszerek kialakulása* (Development of the system of bourgeois private law). Gazdaság- és Jogtudomány, 1969. pp. 245, 268 et seq. Mádl, F.: *A deliktuális felelősség* (Delictual liability). Budapest, 1964. p. 349.

level of care and the fullness of compensation. Incidentally neither the German, nor the Swiss Codes can be included mechanically into this comparison (and in particular the socialist Civil Codes will defy such a comparison), inasmuch as the accurate equilibrium in this construction presupposes an economic force on the whole balanced on the part of the partners to the bartering relations, i.e. a balance which could only be found in general nature only in the era of classical capitalism. In later Codes running parallel with the triumphal march of objective liability the principal question was the relations between objective and subjective liability, the general nature of subjective liability was a question of only secondary importance. The *Allgemeines Bürgerliches Gesetzbuch* (ABGB), which formally was a contemporary of the *Code Civil*, yet indeed it was based upon late feudal conditions not yet mature for a bourgeois revolution, in a characteristic manner tilt the scales for the benefit of the tortfeasor: the rate of damages being dependent on the degree of culpability of the person causing the damage. (In a like way it was characteristic that the *Allgemeines Handelsgesetzbuch* of 1863 abandoned this principle.)[10]

However, before proceeding to subsequent regulation we have to refer to yet another determining factor of the original pattern whose change influenced to a high degree later regulation. The sensitive chemist's scales of the construction of liability here outlined was covered by the absolute rule of the privity of contract as if by a glass bell.[11] Its effect on delictual liability manifests itself in the case of both the breach of contract caused by a third person and its reverse, of the third person suffering loss owing to a breach of contract. Thus the thesis of the privity of contracts substantially influences such problems of importance as the relation between contractual liability and liability for tort, the existence of the general prohibition of causing damage, i.e. for practical purposes in general the whole field of the assertion of liability. In connection with the basic pattern of liability discussed here it is important that according to the original doctrine the third person does not answer for a breach of contract attributable to his conduct, neither the contracting parties answer for the damage caused to him. On the level of the original construction this thesis reinforces the idea that in liability the positions of both the injured person and the tortfeasor can be dealt with only with reference to each other, and that here there can be no question of considerations of other legal relations, not to speak of extra-legal social etc. considerations. The disintegration of this principle[12] proceeds in parallel and in permanent interaction with the disintegration of the classical pattern of liability.

[10] Not only because it is of later date, but also because it is a Commercial Code.

[11] This principle appears expressly in the Code Civil (Article 1165).

[12] See HARMATHY op. cit. and *Felelősség a közreműködőért* (Debtor's liability for subcontractor). Budapest, 1974. Chapter III and SÓLYOM, L.: *Die Beschränkung der materiellen Verantwortlichkeit. Der Ersatz des Drittschadens.* Diss. Jena, 1969. Chapters V and VI.

In what has been set forth so far we have intended to present a generalized construction and have therefore deliberately declined to rely on the analysis of actual legal provisions. As a matter of fact, if we transplant this construction into "life" then we shall already be confronted with the history of its transformation. On the other hand, in our opinion this is the abstract construction which exists — as a rule — in the consciousness of men and which detached from the actual development of law, so to say in a petrified form, appears to be equitable and self-evident for everybody. The conviction of the public that any damage caused in a culpable manner to another person must be made good, is a factor which exactly in the new regulation or in the appraisal of the prevention expectable from this regulation cannot be ignored.[13] In the foregoing we have intended to promote the recognition of the ideological roots of the lasting character of this popular pattern of liability. Eventually the construction in its purity presents the equilibrium which in principle is characteristic of civil law liablity and whose dissolution at the same time brings about the continual decrease of civil law liability.

Hence the classical solution of civil law liability relies on the understanding that it wants to satisfy the interests of both reparation and liability. The two interests will on the level of the individual prevail against each other. Thus their integration into a single system must necessarily be based upon the notion including this contradiction, i.e. standardized culpability. This fragile system could not be serviceable unless it was supported by the balance of external factors. Such a support was given by the economy of classical capitalism, where the economic power of the partners, the social benefit of their activities, and their risks were on the average proportionate to one another,[14] and where the relative independence of the partners was not yet a mere illusion. The maintenance of a balance of interests was insisted on also by the development of capitalism: the tortfeasor entrepreneur had to be protected against exaggerated expenditure in the same way as the injured party against loss. Even in economically unequal relations, notwithstanding all material injustice, the interests of accumulation (here the protection of the tortfeasor) prevailed, a circumstance which in the given construction reinforced the subjective basis of liability.[15]

2. *The development of the position of the tortfeasor.* Although the careful

[13] E.g. EHRENZWEIG owing to adherence to culpability regards the situation as immature for the introduction of general insurance against damage. (*A psychoanalysis of negligence.* Northwestern U.L.R. 1953. p. 855.)

[14] In this respect it is noteworthy that liability for fault is invoked e.g. when dangerous things collide, where at least a balance of "hazards" must be presumed.

[15] FLEMING (*The role of negligence in modern tort law.* Virginia Law Review, 1967. p. 819) demonstrates that this process in the first place confined to the liability for products and to the originally rather *subjective* liability for industrial accidents.

treatment of the tortfeasor remained a current task throughout,[16] the growth of the significance of objective liability had already to be considered the product of the upsetting of the balance of interests. From the "second distribution of damages", i.e. from the unfolding of objective liability onwards the development of the liability for damages *has been governed by the satisfaction of the interests of the injured person.* It is not our intention to demonstrate the revival and progress of objective liability. Here we would merely point at some of the factors of the background which in our system are indications of the definitive disintegration of the "external balance." Already in the beginnings of monopolistic capitalism accumulated national wealth reached a degree which economically *made it possible*[17] what from the other side was *obtained by force* by class struggle: the primary satisfaction of the interests of the injured person. What was in the background was that in a large and gradually expanding area of the relations of damages parties of particularly unequal positions encountered one another, viz. worker and manufacturer, consumer and producer, travellers pressed for producing evidence *(Beweisnotstand)* and the highly organized railway company, moreover the citizen suffering the loss and the state machinery. The individual as injured person is not in the position to produce evidence of the fault of the tortfeasor, whereas if he is the tortfeasor, then in certain relations the mechanism opposing him can increase the consequences of the damage caused out of any proportion. In relations of this kind the axle of standardized culpability will tend to crack under the pressure of conflicting interests and the system of subjective liability will get stranded. In the interest of reparation the basis of liability i.e. culpability, had to be sacrificed. The class struggle led to the declaration of the objective liability of the employer; safeguard against the risks caused by motorized vehicles was also the interest of the citizens.[18] These forces received almost ready-made the liability without wich was so to say discovered newly by the Prussian Railway Act of 1838, and which, however, now becames tied up with liability insurance.

(a) On the present consideration this manifests itself as two stages rapidly following upon each other of the *separation of the position of the tortfeasor and that of the injured person.* The *assertion of objective liability* itself, which still divided the loss between the tortfeasor and the injured person, opened the path for the overwhelming part of theory to find a motivation outside liability for the obligation of compensation. The variants of the principle of interest

[16] On the soil of objective liability this is represented as "public interst" and appears as the financial limitation of liability. RINCK: *Gefährdungshaftung.* Göttingen, 1959. p. 24.

[17] This factor is of importance even today: the social distribution of losses (with any reversionary mechanism even over the widest risk-carrying layers) is a problem of the well developed countries.

[18] In France the same result has been achieved with the presumption of fault.

first of an individual, later of a collective tint,[19] further the principle of imposing the liability for damages caused by socially useful, yet at the same time dangerous activities, have on the tortfeasor's side superseded the principle of the anyway only statistically existing liability of moral roots. RINCK repeatedly emphasizes that in the maze of economic and political interests many times crossing one another the determination of social utility and liability, i.e. the definition of the scope and extent of the assertion of objective liability, cannot be left to general theory, being this the sphere of political decisions of the legislature.[20] Yet the simultaneous establishment of liability on the grounds of equity depended exactly on this pragmatic-political decision. This relationship[21] of the new path of compensation casts a light on the waning of the contents of the tortfeasor's "liability".

For the time being we shall leave the question open whether regarded from the aspect of material interests, i.e. external balance, objective liability, in fact means the tightening of liability. Is the case not one of upsetting the balance first on the side of the injured party and then of bringing about a new equipoise by "tightening" liability? This thesis will in the first place be of significance where stricter liability has been offered as the reason for the limitation of objective liability. What is of importance at present, however, is that the possible new balance does not appear as the earlier structure, still its leading principle, viz. the *protection of the interests of the injured person*, so to say becomes independent, will decisively influence the stubbornly surviving earlier construction.

It is the most conspicuous sign of this development that in the cloak of a construction of tort, practice has set up so strict requirements for care and caution which in reality efface the difference between liability for fault and objective liability. The analysis of this thesis will be one of the primary tasks of the present paper. Here we refere only to the fact that the priority of the interest of the injured person has — as regards the entirety of the tortfeasor's position — led to a higher degree of liability, also in the material sense, irrespective of whether or not the upsetting of the "external balance" justifies this development everywhere.

(b) It remains a fact that at the time of the spread of the idea of objective liability the disintegration of the earlier form of liability was in the first place emphasized, while the changes in the position of the tortfeasor were looked upon, in an isolated manner, as the tightening of liability. The cross-reference of damages and liability as expressed by objectivized fault has disappeared.

[19] See FÖRSI: op. cit. p. 32.

[20] RINCK: op. cit., pp. 5 and 24.

[21] MÁDL: *A deliktuális felelősség* (Delictual liability). pp. 405 et seq. From the RHG debate the "social" motive of equity on the part of the legislator is evident. (Ibid. p. 417.)

Apart from a few exceptions theory has never tried to restore this situation in any new form. What may account for this is that the individual, or in this connection, bi-personal approach to the problem has become a thing of the past. Thus the development of the tortfeasor's position has entered on a separate path. Though it is the interest of the coverage of the loss already manifesting itself as a social interest which determines this position, still the direct motive is here the protection of the tortfeasor against the loss incurred by him as a consequence of his own liability for the damages caused by him. At this point the second stage of the separations of *the position of the injured person and tortfeasor has been reached, viz. the establishment of insurance against liability.* At the beginning this insurance covered the tortfeasor only, and even here not the cases where damages would have meant an unbearable burden on the one causing the damage. In the interest of the employers being the principal parties to insurance in the beginning liability insurance seemed to be created against the interests of the injured persons.[22]

Once this step had been taken the injured party was confronted with the liability insurer accepting the responsibility instead of the tortfeasor. In the course of further development the person really causing the damage has almost completely become detached from the procedure of the compensation of damages. His position has been defined by his relations to the insurer and not to the injured person. On the other hand, the insurer has lost his position of the neutral "surety". In the relation between insurer and injured person the interest of the latter in the reparation will dominate, viz. an interest which will have to be reconciled with consideration of the insurer's business interests and not with those of some liability. This policy accounts for that, as will be seen later, the changes insisted upon or achieved by the interest of the injured person, though *formally giving a shape to the liability of the tortfeasor*, define the tortfeasor's liability in a way that gradually the insurer actually paying damages rather than the tortfeasor will be in the fore. The point in question is not merely whether on the pattern of the principle of equity "riches oblige" on the plea of "insurance obliges"[23] the children of parents holding a home insurance policy will on the ground of equity be liable as children of millionaire parents, or

[22] From this point of view the following work is instructive: VON MOLT (builder of German liability insurance) *Zur Haftpflicht-Versicherung.* Stuttgart, 1900. "Die Förderung der Interessen der Versicherten ist die einzige Aufgabe, die sich der Stuttgarter Verein gestellt hat . . . Die Haftpflichtversicherung . . . steht der Versorgung der Arbeiter nicht bloß fremd gegenüber, sondern sie nimmt eine gegensätzliche Stellung gegen diese ein, sie kann in eine Abwehr gegen Schadenersatzansprüche verunglückter Arbeiter ausarten." (Quoted by JANNOT: *Der soziale Gedanke in der Haftpflicht-Versicherung.* Entwicklungslinien und Grundgedanken deutscher Versicherung. Berlin, 1941. p. 161.)

[23] EHRENZWEIG: *Assurance oblige — A comparative study.* Law and Contemp. Probl. 1950. p. 445. — *The Swedish Law on Liability* (June 2, 1972, No. 207.) In Chapter II, sections 2 and 3 among the conditions of the liability of minors and lunatics it expressly mentions the existence of liability insurance.

whether the courts will in general oblige the insurer to pay damages of an amount greater than the tortfeasor would be obliged to pay. Thinking in terms of "covered loss" will also — as a rule — lead to a situation where the burden of the unsettled circumstances of the causing of damages (e.g. of causality) will be relegated by practice to the sphere of the "tortfeasor", instead of that of the injured person. The courts do not take only the existence of an insurance contract into the consideration but also examine whether in the given situation insurance is customary or can be expected.[24]

Sooner or later the tortfeasor will disappear from his own position: it is contrary to the financial interest of the insurer or the employer to bring a counter-claim against him,[25] they do not consider prevention their obligation (except for socialist employers). *At the terminal point of development the tortfeasor in fact disappears from the sphere of the tortfeasor*: instead of unknown, insolvent, or simply uninsured tortfeasors[26] damages shall be paid from special funds. The only *possible* consideration of damages of this kind is the extent of the loss arisen, i.e. not any liability for damages. Under such circumstances it would be better to draw the consequences also formally and substitute the accident or property insurance of the injured person for liability insurance. Insurance — safety? In a statical sense only any damage incurred will be compensated. However, insurance whose original function was the protection against accidental damages, will on becoming general change any damage into an accidental one. With the disappearance of the tortfeasor and the considerations of prevention a hailstorm making havoc with the crops or an excavator cutting the power cable so that the eggs in the incubator will become addled, a stroke

[24] If the tortfeasor is covered by or could have been covered by a liability insurance there is no question of the equitable mitigation of damages. So decrees e.g. the Swedish law on liability in the sphere of the liability of the state and employer (Chapter IV, section 6), further with general validity the Dutch draft civil code. The institutionalization of similar German practice has been suggested by WEITNAUER: *Entwicklungslinien des Haftungsrechts.* Juristen-Jahrbücher, 1963/64., p. 282. Cf. OFTINGER: »Es ist nicht zu verkennen, daß die Existenz einer Haftpflichtversicherung es dem Gesetzgeber und dem Richter erleichtert, die Haftpflicht zu bejahen oder zu verschärfen. Über ihr ursprüngliches Ziel, den Versicherten zu decken, hinaus, ist der Zweck der Haftpflichtversicherung heute weithin der, dem Interesse des Geschädigten zu dienen.« (*Haftpflicht, Versicherung und soziale Solidarität bei der Wiedergutmachung von Schäden im schweizerischen Recht.* Recueil de travaux suisse, 8e Congrès de droit comparé. 1970. p. 117.) For the tightening effects of liability insurance see JÖRGENSEN's examples. (*Ersatz und Versicherung*, VersR 1970. p. 205.) In obligatory insurance the insurance company will pay even in want of insurance (HANAU: *Rückwirkungen der Haftpflichtversicherung auf die Haftung.* VersR 1969. p. 295.)

[25] Cf. JÖRGENSEN: *Towards a strict liability in tort.* Scandinavian Studies in Law, 1963. p. 27 and SCHÜTZ: *Der Begriff der groben Fahrlässigkeit und seine Anwendung auf § 61 VVG,* 640 RVO VersR 1967. p. 734.

[26] Even then the French Fonds de Garantie pays (since 1951) and so also the German HUK-Verband (since 1963). Instead of the Garantiefonds the state pays in Switzerland. The state for its part takes out a reinsurance policy and there lies a direct claim against the insurance company. Also the Hungarian State Insurance Office pays a compensation for damage caused by unknown motor vehicles. (Government decree No. 42 (1970). (X. 27.). § 3.)

of lightning or the explosion of a firework rocket falling out of the passenger's pocket running for the train and so wounding him, will equally appear as featureless and unctrollable disasters or calamities. An incurable tumour, or a fatal blunder from grave negligence at an operation for appendicitis, all lead to the same result: the insurer will pay.

I.e. if he pays. The acceptance of reponsibility of the insurer relies on the insurance contract, i.e. his own business, and he will hardly acquiesce in being drawn into a sphere where other considerations will also have a word to say. Anyhow the insurer will refuse payment when he has succeeded in finding an excuse for non-payment, and it stands to reason that he will take action against a "tendency spread within a wide sphere" according to which "insurance must be regarded as a milch-cow which is to be milked."[27] Incidentally this tendency is double-edged also from the point of view of the tortfeasor as insured under a liability policy, not only because of the rise of the premium payable, but also because the insurer may by manipulating the sphere of risks decline the payment of a part of excessive damages adjudged.[28]

(c) All that has been said here concern us mainly *because excessively extended insurance might in many respects frustrate its own ends.* By the side of the modern mechanism of insurance and the rules of liability operating in a parallel manner it is the interest of the potential tortfeasor to sign a policy only for a limited sphere of risks, or to refuse the assumption of the costs of insurance in scopes where for practical purposes his liability rests on insurance. Or as put by GAMILLSCHEG: why should a man, who incidentally could not be held liable, pull himself — as a Münchhausen the other way round — by his own pigtail into a morass?[29] *Hence the counteraction launched in the interest of the insurer has again brought to light considerations of liability,* even if only in the form of adjusting insurance to the "natural" extent of these considerations. It has further brought to light considerations of liability also in connection with counter-actions. The opinion as if a claim for regress were outside the economic interest of the insurer has not yet reckoned with the excessive liability of the insurer.[30] At the end of the process of his vanishing the tortfeasor emerges once

[27] A typical, thoroughly grounded article which, however, respects the interests of the insurance company only: BUCHNER: *Der Versicherungsgedanke im Schadensrecht.* VersR 1967. p. 1033.

[28] Mainly where it is not the insurance company that directly appears as a party in a law-suit. Cf. HANAU: VersR 1969. p. 294.

[29] This is what GAMILLSCHEG (VersR 1967, p. 514) asks in connection with the employee, who without insurance was not liable.

[30] The Uniform Insurance Act of the Northern Countries permits the exclusion of the counter-claim of the property insurer, or its limitation, among others in cases of light negligence. However, Norwegian and Swedish practice shows that action was brought in all cases when a waiver of it had an effect on the premiums, or when the tortfeasor was representative of a large economic unit. (Cf. JÖRGENSEN: *The decline and fall of the law of torts.* Am. J.C.L. 1970. pp. 48 et seq. and VersR 1970, p. 200.) Obviously riches obliges also for the benefit of the rich.

again, even if not *vis-a-vis* the injured party. In his relation to the insurer, however, his conduct is made subject to an even more careful and individualized scrutiny than in case of the compensation of damages. It is not the average care that constitutes the standard here, but grave negligence in the case of a counter-action, or concrete activity in the case of an increase of risks.

The protest of the insurers emphasizes in a resolute form also other spheres of the subjectivization of liability, so e.g. the dash forward of the idea of the safeguard of rights of personality and the payment of damages for moral injury or prejudice. As a matter of fact under a liability insurance only the "compensation" portion of the smart-money would be payable on the plea that the portion representing the "penalty" or "satisfaction" is as the expression of the personal relationship between tortfeasor and injured incompatible with the collective system of insurance.[31]

(d) *This career of the position of the tortfeasor, viz. a career running through the stages of objectivization, leaves the relation of direct liability for damages, becomes an individualized secondary liability,* will as a matter of course stand out most clearly in the classical scopes of objective liability and insurance, viz. liability for industrial and traffic accidents. Rigorous judicial practice, however, each day creates its cases of liability for dangerous activities and thus the future partners of voluntary liability insurance. *The demand for greater care* will anyway be discussed in detail subsequently. Instead of examples taken at random we shall call attention to yet another factor in the assimilation of subjective liability to objective liability. The standard of care does not only rise, but tends to *specialize* at the same time. A layman will be more and more at a loss when a judgement has to be formed of the care the specialist has applied in his procedure. In economic life it is particularly difficult to decide how from the point of view of economy optimal preventive measures comply with the standards of due care and caution. The judge cannot even distinguish between the considerations of economy when establishing a relationship between the costs and the magnitude of the hazards as FLEMING put it.[32] In practice all these will lead to a situation where those concerned will content themselves with finding a common denominator in terms of money in the provision for a coverage, i.e. in liability insurance. An outcome of the specialization of the standards of care are the extremely *close relationship between the requirements and the concrete facts and the consequent intermingling of guilt with unlawfulness.*

Under the circumstances the formal existence of subjective liability will by itself betray not much of the position of the tortfeasor. We have already

[31] E.g. in Austria the law had to compel the insurance companies to *full* compensation .(BGBl. 69/1968.) In connection of the liability rules respecting personal conditions the reconcilability of the two opinions is to be examined in all cases (equity, limitation of liability on the plea of family, etc. relations). See HANAU: VersR 1969. pp. 295 et seq.

[32] According to FLEMING, op.cit. pp. 820—821 in case of random tests it is always the keeping of costs on a low level, and never security, that is the principal consideration.

made it clear that the same end may be achieved by the presumption of culpability and the rigorous limitation of the causes of exemption as by objective liability. The tortfeasor's liability may be made rigorous by the *onus probandi* and also by the extension of liability for others. Formally we shall even in this case remain within the sphere of liability for fault, when the judge will on the plea of tort consider the risk rather than the care to be applied.[33]

In our opinion there will be no change in the present trend if certain not too conspicuously hazardous areas remain under the rule of the traditional principle of culpability. Still the tightening of the obligation of care manifesting itself as a general tendency cannot be excluded from here either, in particular when as may be expected liability insurance will be extended also to this area.[34] In connection with the counter-claim, here too a differentiation of the degrees of culpability are to be established, i.e. here too the two-directional disintegration of the traditional structure will set in.

(e) To complete the investigation of the tortfeasor's position we have to call attention to a phenomenon of the depersonalization of the position, which though in its roots not new still by becoming an autonomous institution casts a fairly distinct light on the development of liability and its motives. The case is one of "*channelling*" of liability[35] in a way as has become reality in the regulation, international and national, of the liability for *damages caused by nuclear tests* and experiments. The channelling of liability means that liability has to be concentrated on one of several persons who may be held liable for the loss by virtue of the general rules. Channelling may today be discovered on two stages of development. Economic channelling gauged by the general changes of the tortfeasor's position corresponds to the general establishment of liability insurance. In addition to the owner of a "nuclear plant" formally every person co-operating with him remains liable for any damage caused. The owner assumes liability in an economic sense in so far as he buys a liability policy *also* for those co-operating with him, the limitation of which is for practical purposes eliminated by the State as surety. Channelling differs from its antecedents (e.g. obligatory insurance of motor vehicles) only by confining the possibility of bringing a counter-claim by the insurer to the case of willfulness. "Legal channelling" does not even keep the element of formal liability. For damage caused by nuclear risks, irrespective of their causes the injured person may bring an action for damages only against the owner of the nuclear plant. The owner may enter a counter-claim against the person willfully causing the damage.

The forces in the background stand out quite distinctly: the designer, further the branches of industry taking part in the construction and operation

[33] According to TROLLE, judge of the Danish Höjeste Ret, "the courts speak in terms of fault, they think in terms of risk" (Risiko og Skyld, 1960), quoted by JÖRGENSEN: op.cit., note 25, p. 48.

[34] Cf. FLEMING, op.cit., pp. 840 et seq.

[35] The expression has spread since the Price-Anderson Amendment of 1957.

of the power plant have refused to assume the risk of the compensation of damage attributable to them. Since these have in the sphere of the Common Law achieved their exemption, the developing European nuclear industries depending on American atom industry had to accept this exemption in international Conventions and in their municipal legal systems. By channelling a large number of "insurance pyramids" built up separately could be dispensed with. This arrangement has its advantages from the point of view of both the insurer and the owner.[36] Apart from a few negligible exceptions channelling itself does not impair the position of the injured person.[37]

On the Continent theory has ranged this phenomenon with the tendency which shifts liability to the economically stronger party, and directly qualifies it as a postulate of justice in an industrial society.[38] In our opinion all that has happened is the *projection of the structure of liability for risks as developed between tortfeasor and injured to the internal relations of the tortfeasor's side.*

3. We may proceed in outlining *the position of the injured person* by the rightful assumption that no spectacular changes can be reckoned with here. The cause lies in the construction of liability: except for the mechanical limitation (by amount or kind of damages) of the compensation of damages, any change in the position of the injured person can only be achieved by the appropriate formation of the side of liability. There are yet other causes which seem to confirm the appearance as if the injured person's position were the "*conservative*" aspect. *Within* the construction of liability for damages it is (the ground of) liability which may vary qualitatively, whereas the compensation of the damage is a permanent consideration subject to quantitative changes at most.

(a) However, this picture *prima facie* appearing as proper will become questionable when the change of the compensation of the damage as that of the principle underlying the position examined is considered. The position of the injured person is *by itself* defined by the principle of *casum sentit dominus.* For any exception to this main rule important reasons have always been necessary: these constitute the foundations of liability or of other mechanisms of the distribution of damages. Historically the main rule was the bearing of the lass by the injured party, a rule which gradually was thrust to the background. The declaration of the classical rule of general validity of liability for torts indicated that on the separate small balance-sheet of the social interest the interest of the *dominus* in shifting the damage caused to him (and its pro-

[36] See HUG: *Haftpflicht für Schäden aus der friedlichen Verwendung von Atomenergie.* 1970. pp. 24 et seq., 40 et seq.

[37] See KANNO: *Gefährdungshaftung und rechtliche Kanalisierung im Atomrecht.* Düsseldorf, 1967. pp. 35 et seq.

[38] Cf. MOHR: *Die Kanalisierung der Haftung unter besonderer Berücksichtigung des Atomrechts.* Berlin, de Gruyter, 1970. p. 38.

jections to society) on the one part, and social interest attached to the protection of the tortfeasor and to prevention on the other, have as a rule socially and dogmatically become balanced. Earlier we have mentioned that it was the positive inequality of tortfeasors and injured parties which under the given economic and political conditions led to a new victory of the interests of the injured party. Although originally these interests lay in the restoration of the real rate of compensation, notably the rate which subjective liability in its hey-day afforded, the drift of the development swung the scales over the deadlock. New factors too have been added to the inertia and as a consequence we may now speak of the *preponderance of interest attached to the compensation of damages*. Eventually even on the side of the injured party the question is that of the metamorphosis of the fundamental principle: the principle of *casum sentit dominus* and the correlations of the shift of the loss, i.e. the two classical pillars of the distribution of loss, *do not prevail anymore in their original form and to their original extent*, moreover they impress the legal mind as if they were rather strange things.[39] The *casus* itself in the strict sense of the word, now shrinking to a gradually dwindling field, has ceased to be appreciable burden on the injured party.

(b) Hence the dominant trait is the *protection of the interests of the injured party*. The *minimum* of this protection is the emancipation of the civil law considerations of damages, viz. the actual existence of "*the general prohibition of tortfeasance*." Professor Gy. Eörsi demonstrated that in principle the capitalist legal systems rely on the permission of causing damage, the principal exceptions to this rule being liability for culpably caused damage, the objective liability for damages now in a state of becoming general, and other grounds of liability of increasing significance. On the other hand, in socialist law the general prohibition of causing damage is the general rule with exceptions specified by statutes.[40] Professor Eörsi focusses attention in the first place on the *statutory* protection of the injured person. This approach in its historicity presents the different origin of the two systems and also the difference in attitude concealed behind a general formula of tortfeasance. Obviously capitalist judicial practice can on the given statutory basis only approximate the standards which contemporary socialist legislation guarantees with general validity. In view of the role of judicial practice almost competing with legislation in the capitalist countries of the Continent, further of the circumstance that in the practice of certain socialist countries also tendencies limiting liability begin

[39] For the latter cf. Widmer, P.: *Gefahren des Gefahrensatzes. Zur Problematik einer allgemeinen Gefährdungshaftung im italienischen und schweizerischen Recht.* Zeitschrift des Bernischen Juristenvereins, 1970. p. 289.

[40] Eörsi, Gy.: *A károkozás általános tilalma és megengedettsége a szocialista és a burzsoá jogban* (General prohibition or permissibility of causing damage in socialist and in bourgeois law). Állam- és Jogtudomány, 1962. p. 287.

to prevail,[41] the statement may be made that for practical purposes *the general prohibition of tortfeasance asserts itself* in the laws under study.

This is, however, by no means an indication of the *preponderance of the interest of the injured person* to the prejudice of the tortfeasor. We should be looking in vain for a precipitation of the latter viz. the preponderance of injured interest in the civil codes, since its aspects extend beyond the scope of civil law, *whereas in judicial practice it is unmistakably present.* What surprises TUNC in the development since the 19th Century is the generous practice of the courts in actions for damages. According to KEMP, French judicial practice as opposed to the bills on liability, "has been during the latter fifty years in all cases protecting the benefit of the injured person."[42] In Swiss courts actions can be instituted "without any traditional grounds" in matters of paying of "obviously unsatisfactory" damages by the insurance companies.[43] The changes occurred in the attitude of English law stand out clearly in *Chaplin v. Boys* (1969). Here the plaintiff injured in a car accident on Malta could claim damages in the amount of 53 pound sterling under Maltese law, and 200 pound sterling under English law. The House of Lords "in the interests of justice" made an exception to the principal rule of the conflict law. What this exception means was clearly formulated by Lord Denning: "He gets justice here in that he gets fair compensation." HOLMES in 1897 thought it was a bad man who wanted to choose the law by which he could obtain more compensation than by another.[44]

This decision is at the same time also an illustration of the recently *widely spreading new wave of equity.* The respect for the interest of the unjured party of such a degree is only one aspect of the weighing of interests appearing outside the traditional construction of liability, often establishing "liability" in certain cases on the other side.[45] In English law since the Hedley Byrne (1963) the

[41] So e.g. in the practice of the German Democratic Republic limitation to the compensation of too narrowly defined direct losses, and even in the legislature the denial of the general clauses of liability. See SÓLYOM, L.: *Die Beschränkung*, note 12, pp. 108 et seq.

[42] "In this first branch of the law (liability for damage caused by one's own fault — L. S.) one can hardly speak of any real development since the nineteenth century. The only point which perhaps deserves to be stressed is that the desire of the courts to give to the plaintiff a compensation as complete as possible has led them to give generous damages . . ." TUNC: *The 20th century development and function of the law of torts in France.* Int. Comp. L. Q. 1965. p. 1091. KEMP, H. A.: *Zur Haftung ohne Verschulden des Kraftfahrzeughalters (gardien de l'automobile) im französischen Recht.* Annales Univ. Saraviensis. 1960. For German development see CAEMMERER: *Wandlungen des Deliktrechts.* Hundert Jahre deutsches Rechtsleben. Karlsruhe, 1960. p. 49.

[43] OFTINGER: op. cit. note 24, p. 112

[44] HOLMES: "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict." Quoted and commented on in agreement with Holmes by GRAVESON, R. H.: *Towards a modern applicable law in torts.* LQR. 1969. p. 505.

[45] JÖRGENSEN, too, has given attention to the "social" and "welfare-minded" type of the liability. Op. cit. note 25, p. 42.

most differing "policy" elements are analysed quite openly.[46] In the United States the terms remoteness and proximate cause merely indicate the confines within which the clash of the extremely divergent policies (expediency, equity, legal security, social justice, etc.) decide whether or not certain damage can be taken into consideration. "This is not logic. It is practical politics" said Justice Andrews in Palsgraf v. Long Island Rr. Co.[47] Similar tendencies in German practice have been adopted in principle and systematized by the *Normzweck* theory. In the background of the social estimation here mentioned stands the ideology of the "welfare state". Strictly speaking this is what turned the scale in most cases in *favour of the injured person.*

(c) Of course the question may be asked whether the interest of the injured person can stand on its own legs. Was not the classical attitude to liability right when it respected the interest attached to the compensation of damages only when there was a tortfeasor to whom the damage could be shifted on the ground of the principle of liability, whereas there was no such tortfeasor: the *casus* burdened the injured person? We have to set out from the thesis that the *twin-principles casum sentit dominus* and *liability reflect historically the conditions of a (a) not wealthy and (b) individualist society.* After all here the question is what are the conditions of shifting the damages with socially best effects from the one proprietor to the other. Beyond this the *safeguard of the interests of the injured* person was present peripherally only: first, on a moral-charitable basis, in an accidental form,[48] secondly, consciously in a legally regulated form, however, adjusted to a very narrow community of those bearing the risks. Here we should recall the archetype of insurance, e.g. the *lex Rhodia* which distributed the loss with extreme precision (and which left his share on the injured person).

In recent development the two means of the distribution of damage become organized on a social scale, blurring each other, and influencing the development of the category of liability.

The primary protection of the interests of the injured person as for its contents is caused in the last resort by the fact that since the beginning of monopoly capitalism, the *growing penetration of the state* into the sphere of production of private economy has brought about that on the other side, viz. in the spheres of employment, social security, etc. the principle of *laissez faire* could

[46] SIMMONDS: *The duty of care in negligence: Recently expressed policy elements.* Modern L. Q. 1971. pp. 395 et seq., pp. 428 et seq.

[47] Palsgraf v. Long Island Railroad Co. (1928). See ZWEIGERT-KÖTZ: *Einführung in die Rechtsvergleichung.* Bd. II. Tübingen, 1969. pp. 331.

[48] BENTHAM, already in his age, thought that the voluntary support of men in distress or indigent was inadequate. He demanded the regular aid of the legislator for these persons on the plea that the claim of those suffering need to support was stronger than the proprietary rights of the proprietors of superfluous goods. See DUEMONT, E.: *Grundsätze der Zivil- und Criminal-Gesetzgebung. Aus den Handschriften des englischen Rechtsgelehrten Jeremias Bentham.* Bd. I. Berlin, 1830. p. 305.

also not be left unaffected. The guarantee of the economically possible minimum of public welfare, security, etc. has become a function of the state. As the ideological projection of this the "interest of society" may become the decisive factor in the face of individual interests also in the sphere of liability (in the same way as this argumentation has rendered good services also to objective liability). It is characteristic that e.g. in actions for damages brought before English courts decision relies more and more on elements such as "demands of society" (Hedley Byrne), "public interest" (in Rondel v. Worsley) or of the value approach there stands "We the people at large."[49]

The safeguard of the interests of the injured person is making headway exactly where there is nobody to whom the burden could be shifted, rather than in the sphere of liability; of the two mainstays of the system first the one of *casus nocet domino* begins to totter. It is there where the *means* come into being. Insurance, comes into being as a means on a social scale at the time of the spread of objective liability in its form of social insurance or of compulsory workmen's compensation, begins to be socialized, also in the sense of becoming a matter of public law. At the same time insurance goes over to the camp of the tortfeasors. We have already spoken of the effects of liability insurance on the tightening of liability (the thrust of *casus* to the background) and the extent of damages. As has been seen, this process *detaches the position of the injured completely from liability which has remained one of the channels, and for that matter a gradually less and less special one of the care for the injured person.* Under these circumstances in civil law it is the civil or public law solution of the compensation of damage that remains the principal problem rather than the survival of the liability structure (from the point of which the modern practice of compensation may appear as "a mania of solicitude").[50] As a matter of fact if the principle of *casum sentit dominus* is incompatible with the "legal mind of the social state", there is but one step to consider the *shift* of liability for damages incompatible with this legal mind and demand compensation for the damage from the state.[51]

(d) *Hence it is the trend of the position of the injured person that it becomes detached from the liability for damages and finds itself at the boundary of social*

[49] SIMMONDS: op. cit., p. 395.

[50] So e.g. KOZIOL: *Ersatz der Haftpflicht bei Verkehrsunfällen durch Unfallversicherung?* ZfRV. 1970. p. 16.

[51] Cf. KÖTZ: *Haftung für besondere Gefahr. Generalklausel für die Gefährdungshaftung.* AcP. 1970 pp. 6 and 8. Kötz urges the compliance of civil law lest direct state interference should solve the problems. DEUTSCH (*Die Zwecke des Haftungsrechts.* J. Z. 1971. p. 244) raises the question whether the shift of the risk must not be regarded simply as something against the social state, and whether on this understanding it is not the state which should assume the payment of annuities dragging on through the years in the event of negligence. According to RINCK, op. cit. p. 1 the citizen expects to be relieved of disasters by the state. On the other hand it is a fact that counterclaims in German social insurance (RVO. §. 1542) operate against such ideas.

welfare. However, owing to the uncertainty of the criteria of legal policy replacing the system of the distribution of damage, the solution of the bourgeois legal systems is in its entirety *accidental*. The differences out of proportion in the safeguard of the interests of the injured person with respect to the various risks, the unjustifiably unbalanced burden imposed on the tortfeasor, or his exemption from liability reflect the accidental nature of present conditions and the lack of a comprehensive conception and stand visibly under the distorting influence of the reflection everyday life. At the sight of the salient concessions made by draft codifications in case of the compensation of damage due to traffic accidents it may rightly be asked, what justifies the special treatment of a group of victims which is though numerous yet in no other respect special.[52] The consideration of "social interests" from the outset inclines to thinking in group interests, and the discrimination of these groups may in areas being on class considerations neutral become accidental and irrational. Equity of this type may be gravely prejudicial to other groups. It should, however, be noted that the inequalities here referred to manifest themselves in the positive sense on the soil of the system of compensation of damages provided by a comprehensive system of social insurance, by on other public law welfare system (which may be very different by countries.)[53]

(e) We should like to call attention to a dual concomitant of this trend of development in the position of the injured person. First, *the individual and equitable consideration of the interests of the injured person require the same consideration on the tortfeasor's part*. Of course, here a wide gate opens to considerations of general legal liability as well. The decisions based truly on liability superseding formalistic rules, approximating the balance of interests can hardly be reconciled with the equity of the compensation of damages.[54] Still the two interests being from the outset divergent can be reconciled materially also and not only in the form of a rule of liability originating from a compromise,[55] when an appropriate mechanism of coverage guaranteeing the *assertion* of both considerations is inserted.

[52] According to *A Report by the State of New York Insurance Department to Governor Nelson A. Rockefeller 1970* only the motor car driver under the effect of liquor or drugs is liable, for all other persons the insurer of the operator of the car answers. Personal liability is indifferent — even the person suffering a loss of a fault of his own will receive a compensation up to 2000 dollars, etc. WEIR, in his criticism, points out that the proposal is unfair to the victims of other accidents and calls up those learned in law to fight against irrational discriminations. *Automobile insurance . . . For whose benefit?* LQR 1971. p. 595.

[53] For a survey of the social insurance schemes and of their relations to motor car insurance see HIPPEL: *Schadenausgleich bei Verkehrsunfällen*. Berlin-Tübingen, 1968. pp. 30 et seq.

[54] WIEACKER: *Privatrechtsgeschichte der Neuzeit*. 1967. p. 529. He looks with anxiety at the detachment of ethical consideration in the practice of German appellate judicature.

[55] Such a rule may also be an individualizing one, e.g. the Swiss *Obligationsrecht* (OR.) § 43.

It should be pointed out once again that here we have the case of extremely complicated multiple and consequential effects of the positions of the tortfeasor and the injured person. Eventually development is manifest within the framework of a slowly moving dogmatic solution and in the first place in judicial practice. *No wonder that the legal construction often gains its independence and thrusts into the background the interests primarily shaping this construction. To invoke the isolated balance of the two positions* amounts for practical purposes *to a limitation of the compensation of damages.* The most obvious example of this is the limitation of the sum of damages in the cases of objective liability. Many believe, though in our opinion with no proper reason, that this is the "price" paid for tightening liability. Examples of today too demonstrate the survival of compromises of the "old pattern" running counter the trend of development. In the earlier system of American product liability e.g. the contractual liability of the producer was extended to the relatives of the purchaser or to persons who could reasonably be presumed to have come into contact with the goods. The actually applied strict liability in tort extends protection also to the random by-stander if he suffers a loss owing to the poor quality of the goods (e.g. if he is run over by a faulty motor car). Simultaneously with this, however, practice excludes the compensation for economic loss due under contractual liability from the sphere of objective liability and restricts damages to damage caused to persons and chattels.[56] Yet the limitation of the rate of damages in the wake of the extension of the bases of liability can be observed even where limitation takes place on a lower level. Donoghue v. Stevenson served as the basis for the generalization of the liability for negligence, however, since then the guideline of the courts stands out clearly, viz. they apply the neighbour test "in its original form" with utmost caution, and in cases of economic loss and negligent mis-statement not at all.[57]

It is significant that tendencies towards *the limitation of damages* are in most of the cases even beyond the principle of balance also directly attached to the conservative structure. As an example we may quote *the adherence of the insurance companies* to tie their acceptance of responsibility to *the personal liability of the tortfeasor* and their insistence on appraising this personal liability with no regard to the insurance. The same principle will stand out with yet greater poignancy in connection with the unjustifiably long survival of the *contributory negligence* of the injured person, when on the other side not only the culpability of the tortfeasor has become a matter of indifference, but also the tortfeasor himself has disappeared. Contributory *negligence* will operate with

[56] § 2—318. UCC (persons . . . reasonable to expect . . . be affected by the goods), or judgements quoted for the wide sphere of safeguards of strict liability: HIPPEL, E. VON: *Schadenersatzklagen gegen deutsche Produzenten in den Vereinigten Staaten.* Außenwirtschaftsdienst des Betriebs-Beraters. 1971. pp. 62—63.

[57] See SIMMONDS: op. cit. pp. 395 et seq.

stubbornness not only in connection with subjective liability: it will cast a shadow even on liability for risks. Here not only the liability of dangerous enterprises *versus* dangerous activities is involved (Gefährdungshaftung-Mitgefährdung). E.g. in most of the legal systems the owner's liability towards persons sitting in his vehicle is milder than towards third persons. The former as a matter of fact in the knowledge of the risks implied in the use of a vehicle have so to say assumed part of the risks. For setting aside contributory negligence there a struggle exactly on the plea of the coverage of damage by the liability insurer and against the latter's counter-claim is in progress, a struggle which in judicial practice and legislation has won its first victories.[58]

(f) In respect of the entirety of the position of the injured person *socialist statutory law* may point at the advantage to which we have referred in connection with the general prohibition to cause damage. Strictly speaking this advantage is a formal one: the epochal arrears must not be overtaken with an intensity and means varying by partial areas. *In principle* socialist law too has set out from a position of highest order, which can be conceived in case of a closed construction of liability. A similar advantage manifests itself in that with the introduction of liability under labour law and co-operative law a system of collective coverage has been built up which by meeting the interests of the injured person has in an exemplary manner made individual the liability of the tortfeasor. In addition to all these comprehensive social insurance guarantees a minimum subsistence level.

Professor EÖRSI calls attention to the special possibilities provided by state enterprises (at the same time the largest originators and sufferers of damage) for blending the social distribution of loss and liability.[59] This system embraces the traditional civil law spheres of damages and contrary to the disproportion of capitalist development serves as the framework of a balanced development.

What remains *to be decided*, however, is *whether and to what extent* this solid system of liability so characteristic of the socialist Codes of the beginning of the sixties, *is capable of further development*. As a matter of fact this is in its

[58] OFTINGER, op. cit. note 24, p. 121. According to the Swedish Liability Act (Chapter V, section 5) the contributory negligence of the injured person (fault or negligence) relieves the tortfeasor in so far as circumstances permit an equitable treatment of the case. Section 93 of the Foundations of Soviet civil law takes into consideration the grave negligence of the injured partly only. For the general attitude to contributory negligence see HIPPEL: *Schadenausgleich* pp. 65. and seq. For motor car insurance, the attitude of the reformers and the insurers see the dispute of HANAU (VersR 1969. p. 298), BUCHNER (VersR 1967. p. 1031) and HIPPEL (VersR 1968. p. 231).

[59] See EÖRSI, GY.: *A konvergencia problémái a polgári jogokban* (Problems of convergence in civil law). Állam- és Jogtudomány, 1972. p. 437. Three stages may be distinguished in bearing the loss, viz. partly the state bears the loss, partly it shifts it to the enterprise (which at the same time has a collective preventive effect), whereas a small portion of the damage will be recovered through the channel of liability under labour law (individual prevention of loss).

essence associated with the liability for fault and for dangerous activities declared as a general clause. Since liability under labour law has become a self-contained branch of law governed by the relations of another structure, furthermore since within the general clauses of civil law liability the gradual tightening of liability has become a permanent process adopted almost unnoticed by practice, the problem of *the general disintegration of the traditional structure of liability and of the more effective safeguard of the interests of the injured person were so to say been put off in socialist civil law.* Taking only the form of regulation into consideration, the existing system may appear as the possibly best of regulations.

The protection of the interests of the injured person in a manner independent of those of the tortfeasor is also from the point of view of society desirable. This is proved also by the fact that the means already in existence (e.g. the compensations paid by the social insurance scheme) do not distinguish by the origin of the damage.

The fundamental civil right to material support asserts itself through welfare system and obligatory social security.[60] The fundamental guarantees do not, however, mean as if the protection of the interests of injured persons were confined to these. The extent of protection is as a matter of course dependent on the one hand on economic factors, and on the other, on the available means of the distribution of damage. The various interests operate in a highly complicated manner and at the same time determine the ratio of the administrative-, labour- and civil-law channels. It is worth noticing the efforts of the Hungarian state, in agreement with the principles of the new method of economic management, to free itself of the direct functions of compensation for dam age where there are other lawful agents. (So e.g. the system of compensating the damages of state enterprises from budgetary means, and in the field of maintenance an ever widening scope has been assigned to obligation under family law instead of welfare administration.) The economic compulsion of state enterprises to effect liability insurance has on the level of state enterprises been done away with the system of the compensation of damages based upon smaller collectives (which had been earlier promoted even by the prohibition of insurance) together with its preventive effects.[61] It may be questioned whether

[60] See Mrs Garancsy—Lőrincz—Trócsányi: *Az egészségvédelem és az anyagi ellátottsághoz való jog* (Protection of health and right to material supply). Fundamental rights and duties of the citizens. Budapest, 1965. pp. 346 et seq.

[61] Cf. Eörsi: op. cit. note 59, p. 439. Warkallo: *Odpowiedzialność odszkodowawcza* (Liability for damages). Warszawa, 1962. p. 226. The Hungarian Decree 39/1972. (XI. 28) MT. authorizes the state and social organs to enter into insurance contracts. The deputy general manager of the State Insurance Office complains that as compared with 1400 enterprises, 400 enterprises have not effected insurances and that only one half of the total assets of state enterprises is covered by insurance. See Fodor, A.: *A vállalati gazdálkodás és a vagyon biztosítása* (Enterprisal management and the insurance of assets). Népszabadság, February 28, 1973. p. 10.

liability under labour law still performs its original functions also beyond small damages.[62] *Recent development directs attention to the general civil law means of the protection of the interests of the injured party and to the development of these means.*

It appears as if in the socialist legal systems the strengthening of the *protection of the injured person* in the cloak of the given construction were primarily taking place *in practice*. Traditionally socialist *theory* attributes a very important function to the preventive aspect of the liability for damages.[63] Still the changes taking place in practice suggest a revision of this position. The emphasis laid on the priority of prevention might bring about a situation where even the concept of "collective culpability" would forcedly exert its influence even in the field of the material means of the distribution of damages such as e.g. the enterprisal funds and prevention through financial interestedness.[64] On the other hand, on the opposite pole opinions have appeared to the effect that the inevitable development of the law of liability will lead from liability to the pure distribution of loss.[65] Between the extremes the Hungarian solution appears to be the realistic one: viz. in general the principle of liability is maintained, without setting it in its traditional form before the interest of the compensation of damages but as far as possible paving the way for the distribution of loss in the most important separate fields of its application.[66]

[62] A neuralgic point is e.g. the shifting of liability under labour law to administrative channels, or its enforcement against the managers of the enterprise.

[63] Soviet jurisprudence accepts the traditional notion of culpability and denies the liability character of objective liability, moreover Soviet jurisprudence wants to assert considerations of prevention to the prejudice of the interest of damages (cf. Самощенко—Фарукшин: (Samoshchenko—Farukshin): *Ответственность по советскому законодательству* (Liability in Soviet legislation), Moscow, 1971. pp. 118 et seq. Матвеев (Matveev): *Основания гражданскоправовой ответственности* (Foundations of civil law liability), Moscow, 1970. pp. 249 et seq., with other Soviet literature in agreement with these). In the German Democratic Republic the reconciliation of interests in the traditional structure manifests itself in a preventive- educative terminology. However, the stress laid on the "educative effects" of liability will eventually lead to the suggestion of the insertion of mechanisms of the distribution of damage. Bley: *Verantwortung und Verantwortlichkeit in der sozialistischen Gesellschaft.* Staat und Recht, 1972. pp. 950 et seq. protests against recourse to objective liability in the interest of the injured party. "The rejection of the principle of culpability would hinder the initiatives of the workers and would lead to the passivity and inactivity of the citizens." Bley does not make it clear what he understands by the desirable individualization of liability. The idea is pushed through consistently to the idea of care "to be expected of *him*" by Posch: *Die materielle Verantwortlichkeit des Bürgers und der Betriebe im Zivilrecht.* Staat und Recht, 1970. p. 1126. For the coverage of damage caused by a citizen to another Posch proposes the organization of damage funds from budgetary means.

[64] See Матвеев (Matveev): *Вина о советском гражданском праве.* (The fault in Soviet civil law), Kiev, 1955. pp. 229 et seq. Warkallo: op. cit. p. 38.

[65] Warkallo: *Entwicklungsperspektiven der Versicherung und die Theorie des Schadenersatzrechts.* VersR 1972. p. 703.

[66] Mádl, F.: *A deliktuális felelősség* (Delictual liability), pp. 457, 509 et seq. Eörsi: *Correlation between liability and insurance.* Hungarian Law — Comparative Law. Budapest, 1972. p. 95. Sólyom: *A súlyos gondatlanság a biztosítási szerződésekben* (Gross negligence in insurance contracts). Állam- és Jogtudomány, 1972. p. 330.

Die selbständige Entwicklung der Positionen des Schädigers und des Geschädigten im Deliktsrecht

von

L. SÓLYOM

Im Punkt 1. wird die sog. *subjektive Haftung* (die auf typisierte Vorwerfbarkeit gegründet und regelfalls mit vollem Schadenersatz sanktioniert ist) als eine klassische dogmatische Konstruktion dargestellt, durch die das Gleichgewicht der Positionen des Schädigers und des Geschädigten verwirklicht wird. Die Prinzipien der Verantwortlichkeit und des Schadenersatzes werden in dieser subjektiven Schadenshaftung auf eine solche Weise vereinigt, daß sie einerseits mit dem für den Liberalkapitalismus charakteristischen Interessenausgleich harmonisiert, andereseits den Widerspruch des Verhältnisses zwischen dem materiellen Wertsystem und den moralischen Ansprüchen des Bürgertums ausdrückt. Diese ideelle Konstruktion wurde in dem Code civil annähernd verwirklicht; in der Praxis hat aber ihre Auflösung sofort begonnen. Dessen ungeachtet bedeutet für die öffentliche Meinung dieses Modell den »gerechten« Schadenersatz.

In der Laufbahn der Schädigersposition — Verobjektivisierung; Austritt aus dem direkten deliktsrechtlichen Verhältnis; individualisierte sekundäre Haftung — spiegelt sich die Priorität des *Interessenschutzes des Geschädigten* wider. (Punkt 2.) Mit der noch individuellen *objektiven Haftung* wurden für die Schadenersatzpflicht auch Begründungen außerhalb der (letzten Endes moralischen) Verantwortlichkeit eingeführt. Durch die *Haftpflichtversicherung* wurde der Inhalt der Haftung der tatsächlich einstehenden Versicherung angepaßt. Am Ende dieser Entwicklung verschwindet der Schadensstifter aus der Sphäre des Schädigers. Doch stellt die zu erweiterte Versicherung den Gesichtspunkt der Verantwortlichkeit in dem Verhältnis zwischen der Versicherung und dem Schädiger wieder in den Vordergrund.

Eine eigenartige Möglichkeit der Entwicklung der Schädigerposition ist die sog. »Kanalisierung« der Haftung, die das Schadensrisiko innerhalb des Innenverhältnisses der Schädigerposition verteilt.

Auch die *Position des Geschädigten* weist die Veränderung ihres Grundprinzips auf. (Punkt 3.) Infolge der Priorität des Interesses am Schadensersatz wirken das Prinzip *casum sentit dominus* und dessen Korrelate hinsichtlich der Schadensumwälzung nicht mehr in ihrer originellen Form und Proportion. Die Priorität des Geschädigteninteresses wird in der Rechtsprechung verwirklicht. Die Mittel des Interessenschutzes der Geschädigten (in erster Linie die Versicherung) werden aus dem Bereich des an sich betrachteten *dominus* zuerst aufs Gebiet der Verantwortlichkeit verlagert. Selbst die Position des Geschädigten wird von der Verantwortlichkeit des Schädigers unabhängig. Durch die Entfaltung der sozialen Funktion des Staates wird die Deliktshaftung zu einem und immer weniger speziellem Kanal der Fürsorge hinsichtlich Geschädigter.

Das Haftungssystem der sozialistischen Zivilrechte wurde Anfang der 60-er Jahre ausgebaut. Eine Verschärfung der Verantwortlichkeit (im Vergleich zu den kodifizierten Regeln) ist zwar in der Praxis zu beobachten, sie ist jedoch von der Theorie, die immer noch die Präventivfunktion der Haftung betont, und so die aktuellen Probleme vermißt — kaum bemerkt. Durch die neueste wirtschaftliche Entwicklung wurden die zivilrechtlichen Mittel des Geschädigtenschutzes in den Vordergrund gerückt, auch wenn es sich in erster Linie nicht um die Deliktshaftung handelte. Hinsichtlich des Deliktsrechts scheint der ungarische Standpunkt realistisch zu sein, der unter Aufrechterhaltung des Verantwortlichkeitsprinzips — den Möglichkeiten entsprechend — auch den Weg für die Schadensverteilung vorbereitet.

Ставшее самостоятельным развитие позиции лица, причинившего вред и потерпевшего

Л. ШОЙОМ

Статья составляет отрывок из вступительной части большего труда, занимающегося современным развитием правовой ответственности.

В пункту 1 показывается основывающаяся на вменяемости ответственность (к которому основным правилом прибавляется полное возмещение вреда), как конструкция классического отношения, осуществляющая равновесие позиции причинившего вред лица и потерпевшего. Субъективная ответственность за виновность так совмещает ответсвенность с возмещением вреда, что это совершенно гармонизировало с поддержанием равновесия интересов, требуемого развитием либерального капитализма, а также с отношением материальной и моральной сфер. Соответственно этому, указанная конструкция поровну учитывает интересы обеих сторон. Далее, объективизированная виновность идеологически отражает общественное противоречие, существовавшее между нравственными требованиями и материальной стоимостной системой буржуазии. Эта конструкция была осуществлена примерно в code civil; на практике сразу началось её преобразование; несмотря на это, в общественном сознании продолжила жить как справедливая для всех.

Карьера позиции лица, причинившего вред (объективизация; выход из непосредственного отношения возмещения вреда; индивидуализированная вторичная ответственность) отражает первоочередную защиту интересов потерпевшего. (Пункт 2.) Осуществление ещё индивидуальной объективной ответственности нашло внеотвественные основания для обязанности возмещения вреда. Страхование от ответственности приводит содержание ответственности лица, причинившего вред, в соответствии с действительно выстаивающим страховщиком. В конце развития причинившее вред лицо исчезнет из сферы причинения вреда. В то же время чрезмерно распространённое страхование вновь выводит наружу точки зрения ответственности в отношениях страховщика и причинителя вреда. Специальным путем функции лица, причинившего вред, является «канализация» ответственности, которая, собственно говоря, представляет собой нанесение основанной на риск ответственности на внутренние отношения вредоносной стороны.

Формирование позиции лица, потерпевшего вред, тоже представляет изменение ее основного принципа; вследствие преобладания интереса, связывающегося с возмещением вреда, принцип casum sentit dominus и его коррелаты относительно переложения вреда не осуществляются в своем чистом виде и пропорции. (Пункт 3.) Преобладание интересов потерпевшего осуществляются в справедливом судебном решении. Средства защиты интересов потерпевшего, ствупив из сферы casum sentit dominus в область ответственности, отрывают позицию потерпевшего от ответственности и, с развертыванием социальной функции государства, превращают ее в один из каналов заботы о потерпевших, являющийся всё менее специальным. В то же время стремления на ограничение возмещения вреда, связанные с распространением защиты потерпевших, связаются с классической структурой ответственности.

Рядом с системами ответственности, создавшимися до начала 60-х годов в социалистическом гражданском праве, на практике словно незаметно происходит усиление ответственности, а указанные проблемы чуть ли не окладываются для теории, подчеркивающей превентивную сторону ответственности. Новейшие следствия направляют внимание на гражданскоправовую защиту потерпевшего. В этой области венгерская позиция кажется реальным, которая сохраняет принцип ответственности, но по мере возможности, подготовливает и путь для разделения вреда.

Recensiones

Gy, Haraszti: Some Fundamental Problems of the law of Treaties*

Du complexe puissant des questions du droit des traités l'auteur détache deux ensembles de problèmes: les questions de l'interprétation des traités (partie Ière et celles de l'extinction des traités (partie IIe).

Le chapitre Ier de la première partie de l'ouvrage s'occupe tout d'abord de la notion de l'interprétation et relève le rapport étroit existant entre l'interprétation et l'application des traités en refusant nettement par cela la possibilité d'une interprétation abstraite. En parlant de l'objectif de l'activité d'interprétation il explique que le seul but de cette activité ne peut être que la découverte de l'intention commune des parties contractantes à l'époque de la signature du traité en soulignant en même temps que sa manière de voir ne peut être considérée comme sous-évaluation de l'importance du texte du traité.

Dans le chapitre II l'auteur fait connaître la manière de voir de certains illustres auteurs classiques du droit international sur l'interprétation des traités dans le but de mettre à jour les antécédents historiques des principes modernes de l'interprétation.

Les exposés du chapitre III traitant les sujets de l'interprétation des traités sont extrêmement utiles également pour les spécialistes de la pratique s'occupant des traités: ils peuvent obtenir une réponse claire sur la nature des activités d'interprétation déployées par les différents organismes.

Le chapitre IV en parlant des méthodes d'interprétation des traités exprime la manière de voir selon laquelle les méthodes d'interprétation ne peuvent être à l'égard des traités non plus autres, en principe, que celles qui s'imposent à l'interprétation de n'importe quel autre texte, mais partant des particularités des traités ces méthodes ne peuvent être appliquées qu'avec certaines différences. L'auteur divise les méthodes d'interprétation en deux catégories. Il fait une différenciation entre 1. les méthodes basées sur l'utilisation directe du texte du traité (l'interprétation grammaticale et logique) et, 2. les méthodes employant des matières en dehors du texte du traité (l'interprétation historique, pratique et systématologique), tandis que la méthode téléologique constitue une transition entre les deux catégories.

Dans le chapitre V de l'ouvrage est exprimée la conception selon laquelle dans le cas de l'interprétation extensive et restrictive il ne s'agit pas de la méthode de l'interprétation, mais de la question du résultat de l'interprétation. L'auteur arrête comme règle : l'on doit partir de la supposition que les États contractants ont voulu limiter leur souveraineté dans la moindre mesure possible, à savoir lorsque l'on ne peut pas établir sans équivoque l'intention des parties contrac-

* Budapest, Akadémiai Kiadó, 1973. 438 p.

tantes, on doit considérer l'interprétation restrictive comme directive.

Le chapitre VI est consacré par l'auteur à une question spéciale s'attachant à l'interprétation des traités, notamment à l'interprétation des traités, polyglottes, tandis que dans le chapitre VII il s'occupe des règles d'interprétation ayant un caractère technique.

Dans le chapitre VIII l'auteur étudie la nature des règles d'interprétation, et en adoptant la thèse que dans le domaine du droit international on peut considérer les règles concernant l'interprétation des traités comme formées: elles sont uniformes pour tous les genres de traités.

L'auteur systématise les cas de l'extinction des traités d'une manière extrêmement claire dans le chapitre Ier de la deuxième partie de son livre. Il range les cas d'extinction en deux groupes. Dans le premier groupe entrent les cas où l'extinction a lieu sur la base de la volonté commune des parties contractantes. Il range ici les cas suivants: l'accomplissement de l'événement déterminé par le traité (chapitre II); la dénonciation du traité (chapitre III); l'accord exprès des parties contractantes relatif à l'extenction du traité (chapitre IV); la signature d'un nouveau traité inconciliable avec le traité précédent (chapitre V). Dans le deuxième groupe entrent les cas où l'extinction du traité intervient sur la base d'une règle de droit: ainsi l'exécution du traité (chapitre VI); sa violation (chapitre VII); le changement des conditions existantes à l'époque de la signature du traité (chapitre VIII); et les circonstances rendant impossible l'exécution du traité (chapitre IX). L'extinction du traité en conséquence de la perte de la qualité de sujet de droit d'une des parties contractantes ou à cause de la guerre entrerait dans le deuxième groupe, l'auteur exclut cependant ces deux cas du cercle de ses examens.

Dans le chapitre II l'auteur en analysant les cas d'extinction du traité en conséquence de l'accomplissement de l'événement déterminé dans le traité, s'occupe de l'expiration du délai du traité, respectivement de la survenance de la condition résolutoire.

Dans le chapitre VI l'auteur s'occupant du cas de l'exécution exprime sa manière de voir selon laquelle c'est l'exécution qui constitue la mode la plus naturelle de l'extinction du traité. Toutefois, l'exécution ne produit cette conséquence que dans le cas de certains genres de traités. La convention éteinte garde une certaine importance en tant qu'elle assure le titre des prestations exécutées.

L'auteur s'occupant de l'extinction du traité en conséquence de la violation du traité expose dans le chapitre VII le principe fondamental selon lequel la violation qualifiée grave du traité autorise la partie lésée à l'extinction unilatérale du traité. La violation ne se peut concevoir comme une mesure de représailles, mais seulement comme une conséquence résultant de la violation du principe pacta sunt servanda. Si la partie lésée voudrait par réaction éteindre un autre traité existant avec l'État donné, cela ne se pourrait faire qu'à titre de repressailles.

C'est le chapitre VIII qui constitue un chapitre proéminent du livre, dans lequel l'auteur traite l'extinction du traité en conséquence du changement essentiel des circonstances. La manière de voir de l'auteur est très convaincante car suivant lui, la thèse contenue dans la clause rebus sic stantibus constitue à l'heure actuelle une règle objective, de caractère impératif qui se peut faire valoir indépendamment de l'intention des parties existante à l'époque de la signature du traité et le cas échéant peut occasionner l'extinction totale du traité ou de certaines parties de celui.

La partie invoquant le changement essentiel des circonstances n'a pas immédiatement le droit de procéder à une qualification unilatérale, la possibilité doit être accordée aux autres parties intéressées qu'elles puissent contester son attitude. Et si les parties ne peuvent pas

tomber d'accord sur cette question, nous sommes en face des débats internationaux. Si la solution des débats ne réussit pas entre les parties, la partie invoquant la clause est finalement autorisée à procéder unilatéralement. L'auteur constate: la clause rebus sic stantibus en dévêtant son pseudonyme reflétant la fiction de la condition tacite est ressuscitée à une vie nouvelle. Le principe y compris est devenu un élément indispensable des conventions internationales et autorise les parties contractantes à éteindre le traité.

Dans le chapitre IX sur les circonstances rendant impossible l'exécution du traité l'auteur délimite les cas de l'extinction du traité en conséquence de l'évocation de la clause rebus sic stantibus, respectivement de l'inexécutabilité du traité. Suivant l'auteur il y a en premier lieu une différence quantitative entre les deux cas, mais cette différence devient une différence qualitative par suite du fait que les difficultés de l'exécution atteignent la limite où la partie obligée n'est plus capable malgré un effort considérable d'exécuter la prestation. L'auteur reconnaît seulement deux cas de l'inexécutabilité: l'inexécutabilité physique et juridique. Sous ce rapport l'auteur relève: l'inexécutabilité a lieu lorsque survient une nouvelle norme internationale de caractère impératif, sans la violation de laquelle le traité conclu antérieurement ne peut être réalisé. A la différence de la clause rebus sic stantibus l'effet de l'extinction pour des circonstances rendant l'exécution du traité impossible se produit d'une manière automatique.

Comme conclusion de ce court compte rendu sur l'ouvrage de György Haraszti l'on peut constater: les commentaires en rapport avec deux problèmes fondamentaux du droit des traités, notamment avec les questions de l'interprétation des traités et de l'extinction des traités élucidé à un très haut niveau scientifique et avec succès les questions juridiques fondamentales du droit international découlant de ces problèmes. Par cela l'auteur a considérablement contribué à l'enrichissement de la littérature scientifique du droit international. On peut prendre comme certain que tant les spécialistes du pays que ceux de l'étranger s'occupant de la science du droit international adopteront nombre de thèses de l'auteur.

Mme H. Bokor-Szegő

Two New Monographs of Ivan Meznerics[1]

A new phase in the complex scientific elaboration of financial law

I

1. A statement cannot hold unless it is borne out by facts. The statement that a work opens a new phase in a relatively large branch of jurisprudence is by no means a cheap and everyday valuation of it. And yet we shall make no attempt at proving this statement in an elaborate form using a fine choice of words. Let the facts tell the story. In the following we shall enumerate a few, with the proviso, however, that none of them ranks above the others.

2. The works are already for their bulk a brilliant feat of scientific investigation. With their near to hundred author's sheet and over thousand pages, their well-proportioned arrangement the works command the respect of all interested in the study of their subject-matter. By the side of the seemingly extrinsic value stand as a particular merit of the two volumes the nice and lucid formulation, the rounded-off style, the accurate inter-

[1] Meznerics, I.: *A pénzügyi jog a szocialista gazdálkodásban és a nemzetközi gazdasági kapcsolatokban* (Financial law in socialist economy and in international economic relations). Budapest, Közgazdasági és Jogi Könyvkiadó, 1972. 657 p.
Meznerics, I.: *Law of banking in East-West trade.* Sijthoff—Leiden, Oceana—Dobbs Ferry, Akadémiai Kiadó — Budapest, 1973. 427 p.

pretation of the opinions of other authors and the tribute paid to them even in the heat of argument, the publication of the bibliography at the head of each chapter of the English edition of the work on banking law, in a well-arranged form, the list of the effective statutory provisions of the municipal law by chapters in the Appendix to the volume "Financial Law" in Hungarian, together with the enumeration of international agreements and other instruments of a regulatory character published in the scope covered by the work.

3. All these are, however, but external manifestations of the value of the two works. Their essence lies in the contents, i.e. in the fact that on both the scientific and practical sense they offer to the utmost utilizable treatment of all branches of Hungarian financial law, its municipal statutory regulation and its practice. The subject-matter is discussed in the various chapters of the volume "Financial Law" such as: On Financial Law in General, The State Monetary System, Budget Law, Enterprisal Financial Law, The Revenue Law, The Banking and Credit System, System of Financial Control, Financial Law in its International Relations. In the author's work on the banking law structure of East-West trade, published in English, these questions again turn up at the discussion of the domestic banking institutions of the socialist countries. This second work, however, goes as a matter of course far beyond these questions in so far as the author offers a comprehensive and detailed analysis of international settlements the entire system of banking and credit transactions and its institutions. The work, and also its details elaborate picture of the municipal legislation of the socialist countries on international trade, deals with the joint banking, credit and payment system of the CMEA countries operating in international economic relations, institutions developed and established in general international law, private international law, further in international fiscal or financial law, the usances established in international banking practice and their unification of the law of international payments. For these tendencies the United Nations UNCITRAL provided an all-embracing framework promising a high degree of efficacy.

A noteworthy feature of the work is the method adopted by the author to collect and analyse the particular questions, and present them in a form they are so to say set by the actual reality of economic and trading conditions. In the vogue formulation of the age the professional literature has given it the name of complex method of elaboration. We may even say that this is not a merit of the work: in fact reality compels science to try and discover the interrelations of foreign exchange law, private international law, public international law, financial law and commercial law of a given institution in the unity of international banking practice. Here we may mention e.g. the clearing system and how in the operation of this system (such as e.g. the multilateral system of payment of the CMEA countries) with a single stroke the method of regulation of several branches of law turn up. Yet there are opinions and forms of elaboration which in this exaggerated endeavour for a purity of the branches of law would willingly segregate all that is segregable by some sort of an otherwise relevant distinguishing criterion. For this reason it is worth-while to point out that the author wants to discover the substance of the functions of the law and those learned in law consistently in social engineering, and in it he presents the different forms and systems of regulation, which he clearly discerns, at all times in conjunction and by keeping before him the social and economic ends. This in this way meritorious attitude to the problems has, however, become truly valuable by the fact that Meznerics in his writings has not only applied this complex method of approach, but applied it with the

autonomous treatment of an enormous stock of knowledge with imposing success.

On reviewing the works from the side of theory beyond what has been said earlier we have to point out that in the territory of banking and credit transactions in international economic relations the author not merely hinted at, but processed the fundamental theoretical problems of these branches of jurisprudence associated with the subject-matter of the work under review, from financial law onwards through the discussion of the jurisprudential and theoretical questions of financial legal relations and foreign exchange law to the theoretical problems of the subject-matter of international financial law. In an appraisal from the theoretical point of view we cannot ignore that in his theoretical analysis the author in all cases sets out from social and economic reality, the realistic relations of economic and trade policy, and the careful consideration of opinions published in domestic and foreign literature. We specially emphasize this feature of the two works, in particular of the volume on Financial Law published in Hungarian, because in a reader versed mostly in the search for theoretical values the many sections of a practical nature may be apt to screen these theoretical values of the work. It cannot be argued that in particular in the Financial Law by the side of a monographic treatment we have before us a manual for use in the field. However, this but enhances the scientific and social usefulness of the work. The practical and theoretical elements complement each other in a well balanced form. It would amount to a misinterpretation of the two works if we tried to emphasize anyone of their properties or attempted their one-sided blow-up or generalization in a way which would thrust to the background or blur their secondary, scientific or practical, character in an exaggerated manner.

The enumeration of the values of these works, and so also of the facts corroborating what has been stated in the title, viz. these works open a new phase could be continued to any extent. It may, however be reasonably assumed that all that has been said so far suffices. In general a "new phase" or, in other words, a new station of importance is distinguihed from other that it is the focal point of a number of smaller or larger railway lines or traffic lanes in general. In the two works this manifests itself in that, as may be seen from the multitude of facts, in them a large number of lines and directions of traffic concentrate, all coming from the various regions of this vast area of law. At this station the premises of economy and economic policy and the discipline of economy meet one another, and so also the many theoretical problems of this area of law, the main and side lines of financial law, civil law, public and private international law, the regulation of socialist economy, under municipal as well as international law, the universal international systems of regulation, practical solutions and tendencies of development, which stand for the financial processes of international economic relations, and so also for their main streams and tributaries. If all this is taken into consideration, then the designation "new phase" or "new station" may appear as being even too modest.

The reason why the two works are a new station and open a new phase, even in juxtaposition to the two erarlier works of the author on a similar topic,[2] is that since these were written the new mechanism of economic management has during the past years become a fact, it has unfolded itself, and has consolidated in practice. Furthermore the economic reforms and trends of development asserting themselves in the socialist countries in both domestic and international relations, have taken on a more and more decided form. The novel elements of co-operation in East–West trading relations have become more established. All this has launched

[2] See note 1

new, significant developments also in the sphere of law, and the two works of Mezneries have with their way of receiving these developments become in fact a momentous new station. Among the new developments we would mention only such as *e.g.* in the relation of the CMEA countries the Complex Programme of Integration and its various financial effects, the reinforced and differentiated practice of the new General Conditions of the Delivery of Goods, the new joint banking institution of the CMEA countries, the International Investment Bank. In the development of the general international economic relations, we may refer to the efforts for the unification of the law of international settlements sponsored by UNCITRAL, questions which the author discusses almost in detail. As for the changes in municipal law we would mention merely such essential circumstances and developments as *e.g.* the restatement of the legal regulation of investments, the establishment of the state Investment Bank and the definition of its functions, and so on. It is by no means accidental that both the volume of financial Law, published in Hungarian, and that of the Law of Banking in East-West Trade, published in English, are as compared to the earlier two works, new in their titles and as for their bulk by far larger than their predecessors. All these in the aggregate make it clear that here we have not the new editions of two earlier works, but in many respects wholly new publications at the same time being the enriched re-issue of the earlier ones.

4. Naturally neither the author himself, nor the writer of these review does believe even for a moment that all in the two works of Mezneries here reviewed has been discussed for the first time, without any antecedents. Both Hungarian and foreign literature on financial law is of a bulk commanding respect. The same applies partly also to the literature on international banking and credit transactions. Nevertheless in the prehistory of the treatment of the specific subject-matter the works of the author occupy a prominent position. His present work aptly synthetize the results and opinions of some moment of legal literature. It was therefore not by mere chance that three publishing houses of standing considered it would be timely to publish a summarizing treatment of this field of international economic relations just by this author. The three publishing houses were the Publishing House of the Hungarian Academy of Sciences, the Dutch house Sijhoff, and the American Oceana. Thus the work itself has become one of the examples of East-West economic and scientific co-operation, at least in the sense that the three publishers carry the opinions and doctrines of Hungarian and in general socialist jurisprudence to the economic and legal public opinion of all countries of significance in the world, to enterprises, to institutions and to private persons, i.e. to those who believe that profit may be derived from the development of the one or the other area of East-West economic co-operation. It is only hartening that the number of these believers is continually growing.

II.

5. In the following speaking of the latter work, we have to express our agreement with what Andor László, the President of the National Bank of Hungary, has written in the preface, i.e. that in the development of international economic relations the optimal statutory regulation has increasingly important functions, that the survey of the systems of regulation come into being in Hungary and in the other socialist countries for the foreign public, is with special regard to the new economic and legal developments in the wake of the economic reforms introduced in the socialist countries in like way a task to be tackled. The preface makes it clear that in the development of international economic co-operation the acquintance with the banking transactions and in-

stitutions of financial law developed in the socialist countries and comprehensively treated in the work of Mezneries will be indispensable. In like way in the territory of financial transactions with the capialist world and the developing countries for the development of the inadequately differentiated municipal legislation in Hungary the thorough study of the routine established in international practice cannot be postponed any longer. Here too the author's work may serve as an incentive. Furthermore the unification of the law of international settlements is beyond doubt the general interest of a number of institutions. The author analyzes in detail the activities so far displayed by UNCITRAL come into being within the United Nations at Hungarian initiative and with the active participation of the socialist countries. The author does not merely offer an overall picture of what is going on within UNCITRAL, but at the same time takes a definite stand to the questions of the unification of law which have emerged, such as the regulation of universal validity of endorsable instruments, mainly the bills of exchange, documentary credit, and the various forms of the banker's collateral security and banker's guarantee.

6. No review of the work can serve as a substitute for the acquaintance with the wealth of the concrete contents of the work. However, the following concise survey of the whole may perhaps help the reader to form an idea of this wealth.

The work itself is split up into four large parts and into altogether thirty chapters.

Part One deals with the general problems of banking transactions. Here in particular the section on the sources of law should be mentioned. The author reviews the sources of the legal rules governing banking transactions as established in the non-socialist countries. He makes it clear that in the civil or commercial codes the specific rules of banking operations either are missing entirely, or are defined only partially in a satisfactory form, so that in this sphere partly the commercial usages and usances, partly the general rules of civil law (civil law in continental sense), its norms and principles dominate. In the following the author describes the development in socialist economy within which banking operations have been transferred from the realm overwhelming by administrative rules to that of civil law rules. As a matter of fact after the introduction of the economic reform the autonomy of the enterprises has been expanded considerably. This reform has had its repercussions also in the domain of the state banks, and in the methods of economic management those of commerce and trade have attained a prominent position. Enlarging on the development of law in the socialist countries the author among other problems discusses the inadequacy of municipal civil law regulation to meet the requirements of international trade and so also financial operations. Therefore in certain countries special trade legislation has been introduced, in Czechoslovakia e.g. a special foreign trade code. The trend of thought of the author betrays his desire for a more differentiated regulation of the law of international banking and financial operations.

Discussing the sources of the law of banking transactions the author deals with the sources of an international character established in international banking transactions, with the legislative normatives and customs, the rules of international banking operations appearing in the various usances and their method of application in the socialist countries.

Part Two with its sixteen chapters is not only the bulkiest section of the work, but as for its subject, viz. the finances of East-West trade perhaps the centre of gravity of the whole work. This appears already from its headline, viz. Banking Operations in East-West Trade. After the introductory remarks the first section of this part deals with the banking operations

associated with credit. Within the framework of credit transactions the author discusses the legal peculiarities of credit agreements in general, the types of credit current in the financing of international trade, further the banker's loans, their various forms. The treatment follows of the institutions of law established for the guarantees and securities of banker's loans and credit agreements. The author discusses in detail both the legislative and banking practice of the socialist countries and the legislative sources of other countries and of international law. His investigations extend to the critique of literary manifestations of significance, but mainly to banking practice. The reader is given a comprehensive picture of institutions guaranteeing credit and loan agreements such as lien, surety, credit insurance, insurance of bank credits under bills of exchange, the banker's collateral security, etc.

In the section on the banking operations associated with international settlements the author devotes several chapters to the discussion of institutions of law merchant established in this field. After the treatment of general problems of theory and notion the author continues with the discussion of the various forms of settlement, such as e.g. commercial letters of credit, the cheque, the bill of exchange, the encashment or collection, and documentary credit. From this section the foreign reader will learn that among others Hungary too is a signatory to the international agreements negotiated for these forms of settlements, so e.g. to the Geneva agreements on cheques and bills exchange Hungary has also adopted, in banking practice, the generally accepted international usances and as regards documentary credits, the so-called *Règles* and *Règlement*.

The third section of Part Two deals with the foreign means of payment, foreign exchange, purchases of precious metals, and transactions in foreign exchange. Within this section the author offers an interesting survey of specific types of transactions or forms of transactions such as the so-called switch transaction which within the framework of the clearing systems often has been resorted to in cases of deadlocks, when for the mobilization of debts hard to mobilize it serves as a catalyst in the system of international settlements. As is known, the switch deal is but the purchase of an obligation of payment, i.e. a debt, which the debtor was unable to settle merely because the creditor had no need for the goods the debtor country or its enterprises could offer, whereas the switcher did find in another country a demand for the goods in question. The deal was then closed, while the middleman earned a certain profit from both the creditor and the debtor. This is a novel financial operation, in all appearance of spreading popularity, of which statutory laws have not the faintest idea.

Section four of Part Two sums up the efforts made within UNCITRAL, this creation of the United Nations, for the unification of the law of international settlements, together with what has so far been achieved.

In *Part Three* the reader receives a comprehensive picture of the domestic system of banking transactions in the socialist countries. It is for the greater part in this section of the work that the legal institutions are discussed, together with their organizational and legal forms, through which the economy of the socialist countries has developed in this area of national economy, and has produced something altogether new, something new something new that is still in constant flux and in a state of development. The most essential elements of this development are the economic reforms framed, and now firmly established, in the socialist countries, or rather their projection on financial law, a circumstance which has brought about remarkable development also in banking transactions. Undoubtedly the lawyers of non-socialist countries and

others concerned will read with interest the passage of this part which deals with the relations of banks and enterprises. Today it is a commonplace that there exists a close relation between banks and economy, or in other words, the optimum development of economy is but the two sides of the same thing. Under capitalist conditions from the point of view of the economic structure as a whole, in the first place, however, from the point of view of the organization of market competition and the market itself the complementary, or rather domineering role of the banks is a far too neuralgic problem. The bank is there everywhere, and for that matter visibly as well as invisibly. It embraces the circulation of blood of capitalist economy in its entirety. Even the man in the street, in the city and in the suburbs, sees the many branch offices of the many banks. He is exposed to the elaborate publicity campaign of the banks by which they mould much and many to their own image and likeness, while at the same time serve both economically and socially for capitalist ends well designed realistic and rational needs. Given this knowledge it will be of interest for the non-socialist world to see while under socialist conditions the dominant and exploiting nature of finance capital and of money have come to an end, what exactly the function of the bank is in the totality of economic, in the system of economic management. The author offers of all this a tangible picture. Naturally part of this tangible picture is the differentiated system of means through which by way of banking transaction the socialist banks are at the service of management and economy. To convey an idea only of all this, let a few of the outstanding headlines stand here: The Function of the Bank Credit and Banker's Loan in the Socialist Credit System; Legal Regulation of the Bank Credit and Bankers Loan; Bank Credits and Banker's Loans in the New Economic Mechanism; The Function of Credit in the International Relations of Home Enterprises; Loans Advanced to the Population; Bank Guarantee and Banker's Collateral Security; Savings and other Bank Deposits; Bank Account Agreements and Forms of Settlements; Various Account Agreements.

Part Four of the work discusses the problems of banking operations between the socialist countries. One of the peculiarities of the economic relations of the socialist countries is the unification of the rules governing economic relations, so financial relations and international settlements to their greatest part. In the phase of development of socialist economic integration certain organizational institutions of financial co-operation have also come into being, so e.g. the Bank of International Economic Co-operation, on the one part, and the International Investment Bank, on the other. As regards the law of banking operations and settlements this part of the work offers a thoroughgoing analysis of the contract law forms of payments, before all of the forms which have been brought under regulation in the General Conditions of the Delivery of Goods. The author continues with the treatment of operations outside the General Conditions of Delivery of Goods, such as traveller's cheques, credit and deposit contracts, further contracts in terms of foreign exchange and gold. The outlines given of the organization and functions of the Bank of International Economic Co-operation may convey an idea of the operation of the multilateral clearing in the system of settlements of the CMEA countries and within it of the functioning of what is called the transferable rouble. In connexion with the International Investment Bank, which took up operations in 1971, the author speaks in detail of the specific functions the Bank has been called to discharge in the economic and technical development of the member states of the CMEA, before all in the execution of operations for financing investments. The principal form of transactions resorted to by the bank is the advance of

short- and medium-term credits overwhelmingly for financing the joint projects planned for the improvement of the international division of labour of the socialist countries. In addition to the accumulation of the means needed for advancing credits the bank exactly for the performance of its principal functions takes charge also of other banking operations, e.g. it deposits funds with other banks, purchases and sells foreign exchange, gold or securities.

The last section of Part Four allows an insight into the system of payments of the CMEA countries from the point of view of the internal economic reforms. This section of the books thus offers an outlook on future development. Here the author sums up the principal trends of development, synthetizes the tendencies parallel to which the lines of force of further development will in the future in all likelihood tend to become yet stronger. On this understanding he raises the question of convertibility, the demand of genuine multilateralness in the systems of settlement, the enrichment of the forms of payment under the General Conditions of Delivery of Goods, convertibility and the question of uniform exchange rates, the creation of a reasonable financial system of the planned economic co-operation within the framework of joint enterprises and associations.

F. MÁDL

L. Rudolf: International Sale of Goods[1]

I

1. With the work under review the author makes another valuable contribution to Hungarian jurisprudence. This time he presents to the reader a monograph on international sale of goods, a problem which may be termed more than timely. He is right when already in the opening sentences he writes that rapid technical development, the struggle of the nations for the maintenance of peace, the improvement of international relations including the growth of commodity turnover have brought to the fore the problems of international sales. He continues "that the legal reflection of this problem has become complicated because the substantive laws of the particular municipal laws relating to purchase and sale differ from one another both in the socialist camp and among the capitalist countries; moreover beyond this in many a country distinction is made between simple civil law and commercial sales, i.e. between commodity-money relations in the turnover of commodities" (p. 7). To this we may add, what by the way comes to light also from the author's monograph that in both civil law and private international law there is an enormous mass of international treaties, draft agreements, municipal enactments and draft legislation, general conditions of purchase, not to speak of usances established in judicial practice, in particular of the volume of legal literature, all dealing with international sales.

What we missed in Hungarian literature was a modern work, whose author would have chosen international sales as its subject-matter and treated this subject-matter in a monographic form. It is the merit of the author that he has bridged this gap. This is of significance all the more because as is known, in Hungary contracts of international sales have a prominent function as a base of its orientation on foreign trade.

2. The special value of the work is that the author discusses the institution of international sales in its complexity, i.e.

[1] RUDOLF, L.: *A nemzetközi vétel*. Budapest, Akadémiai Kiadó, 1972. 241 p.

viewed from the aspects of regulation the work displays the rules of conflict law as well as of substantive law. Tackling the work from the aspect of the sources of law we shall find in it the statutory and judge-made norms both of municipal and international law. The author indicates this approach to the problem already in the preface, when he writes that "in my present work I intend to study an institution of economy and law gaining more and more importance, and for that matter *in the unity of its manifestation*" (p. 7). This unity of approach manifests itself also in the fact that the author in his research program, extending over a number of years, considered the complex entirety of this institution the subject-matter of his investigations. While dealing with the internal problems of the municipal substantive law on sale he become aware of that he had to go a step further. It was for this reason that after he had published his work *Adás-vétel az új gazdasági mechanizmusban* (Sale of Goods Under the New System of Economic Management)[2] he summed up in a separate monograph the results of his investigations into the field of international sales. It became evident that in the wake of economic reforms introduced in the socialist countries sales gained in importance not only in the system of municipal law, but even more so in the international commodity turnover. All these do not hold true in view of the quantitative aspect of the matter, but also of the circumstance that with the extension of enterprisal independence the particularities of the institution of sale (e.g. the high degree of permissiveness) manifest themselves with yet a greater vigour, among others in the international treaties on sales of outstanding importance, such as e.g. the General Conditions of the Sale of Goods of 1968.

It is part and parcel of the method adopted by the author that he discusses all questions of significance of the institution of sale in a comparative system. In this way the work takes into account the exigencies of modern research work in jurisprudence, which is in every respect justified.

3. The author does not only make survey the works of the most prominent Hungarian and foreign authors, does not only raise problems of theory (the problems of international commercial law, the modern *lex mercatoria*, the concepts of private international law, and that of the international sale of goods, etc.), but while analyzing these at the same time defines his own position. Thus the author enriches the world of our legal thinking and both for the reader and the practice sets the problems he tackles in their proper light. By the side of the historical and theoretical analyses the stress has mostly been laid on the thorough study of the material and legal elements of the institution of international sale, in particular with regard to the sources of law which are of primordial importance and significance for Hungarian foreign trade. Therefore the work of Lóránt Rudolf is valuable also for those engaged in foreign trade. The particular value of the work is enhanced by the index attached to it. With his work the author meets an urgent demand, namely he helps the foreign reader and businessman to thorough and accurate information about the substantive, legal solution of the problems of international sale in Hungary and in the socialist countries in general. This is of importance in particular from the point of view of East-West trade, due to the luck of any international convention bringing under uniform regulation the sale of goods. Consequently here the municipal substantive laws of the particular countries come to the fore. However, the thesis will hold also the other way round: in Hungarian contracts of sale made in East-West relation the rules of sales of one or the other western country are often being applied. The author therefore presents the relevant regulation also

[2] Budapest, Közgazdasági és Jogi Könyvkiadó, 1969. 374 p.

of western countries of greater significance and so adequately informs the Hungarian parties to such contracts. It is due to this treatment of the subject-matter that the author has contributed at the same time in a far-reaching manner to the study of comparative law and also to the teaching of law.

4. Nothing of the kind can be said that so far little has been done in Hungary in the field of the study of international sale (see e.g. the works published by István Szászy, László Réczei, Péter Katona, Iván Szász, Gyula Eörsi, Miklós Világhy, and Ferenc Mádl), or that the work of Lóránt Rudolf simply meant a leap into the vacuum. On the contrary, it is exactly the author, who with manifold and copious references to literature demonstrated that this is not the case. What the author does is to integrate the problem into the unity of scientific analysis with due regard to changed circumstances, by synthetizing the results so far achieved and by extending his investigations to the aspects of civil, substantive and conflict law. If in this connection we specially emphasize that thus synthesis has been made with regard to the changed circumstances, we have in like way to underline that the work of most of these authors cannot as a matter of course convey an idea of the changes which have been brought about in the substance of the institution of sale either in the sphere of domestic relations e.g. owing to the effects of the economic reforms, or in its international relations e.g. with the coming into operation of the new General Conditions of Sales of Goods, or the Hague Convention Dealing with the Uniform Law on the International Sale of Goods. Naturally the author could write this monograph already with attention to these new developments. It is quite natural that none of the authors mentioned above can compete with Lőránt Rudolf in the up-to-dateness of information. In the treatment of an institution of substantive law and in a work laying such a great stress on the presentation of this law, no-one will call into doubt this merit of the work.

II

5. After this appraisal of the work on more or less general lines we shall offer a brief survey of its rich contents. This appears to be necessary all the more because from the modest Table of Contents of a few lines only, the reader will hardly be able to form an idea of what the author in fact offers.

The Introduction of the work is followed by three Chapters. Chapter One deals with the notion sources of law, and forms of international sale of goods. Chapter Two discusses the contracts of international sale, its validity and contents, whereas Chapter Three investigates the regulation of the breach of the contract of international sale.

6. The Introduction goes beyond what in general is meant by the term. As a matter of fact the author discusses in this Introduction the problems of the conflicts of laws in the field of international sale, i.e. problems of international sale from the aspect of private international law in a stricter sense of the word. His investigations extend to the sources of municipal law of both the socialist countries and important capitalist countries, and to international treaties, practice, and in the sphere of international agreements in particular to the General Conditions of the Sale of Goods. The author devotes space also to the discussion of questions of theory such as the autonomy of will and its development, first of all in the legislation and practice of the socialist countries, and e.g. the uniform or pluralist concept of obligations. As is known in both theory and practice opinions diverge as to whether the material validity of a contract and its consequences, the rules of contract-making, further the other formal elements of a contract, and also the question of capacity of contract-

making should be judged by a single law, the *lex causae*. While the author presents in all its details the variegated picture of development in this field, he shows an inclination towards the thesis that there is a number of arguments advocating the uniform judgement of the obligation as a whole. Much could have been added to the monographic value of the work had the author — in addition to the survey of divergent concepts and statutory provisions — analyzed with greater thoroughness the theoretical and legal-political background of certain solutions and the reasons prompting to these solutions. In the absence of such an analysis he gives a more adequate answer to the question: what is the actual situation, than to the one: why is it so?

7. In the introductory part Chapter I he discusses the notion of international sale of goods, partly in the light of positions taken in literature, partly in that of notions embodied by the various codifications. In the discussion of the notion of international sale the author devotes ample space to the problem of what is called autonomous international commercial law, or called in literature as the modern *lex mercatoria*. In the course of this investigation the author parades before the reader the sectoral qualification of the rules governing international trade in their totality, all *pro* and *contra* arguments, the reasons why many would have international commercial law treated as a special branch of law, whereas some conceive it as part of municipal law, others as the unity of provisions of both municipal and international laws, why still others regard autonomous international commercial law as the normative legal organism of international trade sanctioned by practice, embodied by international contractual practice, instruments and general conditions independently of the national legal systems (pp. 35—44). Part of the problem is absorbed by that of the relation of private international law, in the traditional sense of the word, to international commercial law. We may learn much of this and its ramifications from the author's work. The author himself refrains from taking any definite stand. He will even refrain from the confrontation of opinions so as to allow of drawing any definite conclusions in the one sense or the other. In fact it is hard to see justice done among such a large number of opinions and authors. While in point of fact the question remains open and so to say invites to the formation of a concept of monographic nature, or in view of what are termed economic considerations of scientific research and education, of a new perhaps synthetizing concept, there is every indication of the maturing of the situation to a point where the need will be felt for making order in the proliferating garden of theory, practice and jurisprudence by the particular authors preferably within a monograph of greater extent.

As far as the sources of the law of international sale of goods are concerned the author has in mind in the first place the sources of municipal law, still he offers a survey of the sources of law of foreign, in particular socialist, countries in their detail. The portrait he delineates of international contracts is almost complete, and also international usances are analyzed with due thoroughness. In the study of the attempts to achieve the unification of law he lays stress on the general conditions of sales of goods in operation within the countries of the CMEA, and also on the Hague Conventions of 1964. He also enlarges on the work done recently by UNCITRAL.

8. Chapter II deals with the elements of substantive law of international sale of goods. First of all, the author speaks of the making of contracts of sale, and continues with the discussion of the complex problem of the validity of contracts. As a matter of course this Chapter deals extensively with the contents of contracts of sales. The investigations extend here too to the various municipal laws, to international customs, sources of international

codification and naturally to all positions of importance taken in literature. Among the sources of international law here too the General Conditions of Sale of Goods occupy a prominent position and so also to some extent the Hague Conventions of 1964.

9. In a manner similar to the foregoing, in Chapter III the author discusses the problems of the breach of contract. Within this he speaks of the notion of the delay of the obligor and obligee, the facts at issue and the sanctions, and ends with the discussion of defects of quality, i.e. the question of warranty. Within this scope he overwhelmingly treats warranty for the supply of goods of a specific quality. Hence the author discusses the consequences of faulty performance rather than the problems of the warranty of title or legal inadequacy, as it is called by the author.

F. MÁDL

Les contrats de recherche[1]

Dans les conditions de la révolution scientifico-technique de nos jours, la science et la recherche scientifique jouent un rôle important dans l'accélération du développement des forces de production. Dans le domaine de la compétition économique, interne et internationale, la recherche scientifique projetée d'avance et encourageant le développement technique, se substitue de plus en plus à l'utilisation des résultats scientifiques spontanés.

C'est une autre question de savoir par quels moyens, précisément par quels moyens juridiques, peut-on encourager telle recherche scientifique, activité particulièrement intellectuelle, respectivement quels sont les moyens juridiques par lesquels on pourrait le mieux relier la recherche scientifique et l'exigence du renouvellement technique continu. Mais, d'autre part, le rôle de la science moderne devient au lieu du service de la production, la mère de celle-ci.

Ce sont précisément ces moyens juridiques à utiliser, et parmi ceux-ci, en première ligne, les solutions effectuées par les méthodes contractuelles, lesquels l'auteur examine dans son ouvrage scientifique d'une tenue très haute.

[1] LONTAI, E.: *A kutatási szerződések.* A tudományos műszaki eredmények létrehozását és bevezetését elősegítő polgári jogi eszközök. Budapest, Akadémiai Kiadó, 1972. 230 p.

L'ouvrage composé d'une manière excellente se divise en neuf chapitres. Le matériel contenu dans ces chapitres se compose au fond de cinq parties.

La monographie prend son essor par une large fresque de fondement économique et de théorie de science. Dans le premier chapitre l'auteur esquisse le fondement économique et social sur lequel il édifie tout ce qu'il a à dire. En partant du processus de la métamorphose de la science en force productive, il passe en revue les particularités de l'enchaînement recherche-production. Il s'occupe séparément de l'activité étatique dirigeant la science, en renvoyant dès lors aux solutions socialistes et capitalistes plus importantes. Les analyses, par lesquelles l'auteur s'occupe des aspects économiques, sont bien remarquables. Il touche ensuite aux problèmes du caractère de marchandise des recherches-développements ainsi qu'aux relations qui existent entre la recherche et les modèles respectifs du dirigisme.

A la suite du fondement général économique et théorique, la deuxième partie de l'ouvrage comprend, au fond, trois chapitres qui s'enchaînent les uns aux autres (chapitres II—IV). Le deuxième chapitre s'occupe des moyens juridiques qui se présentent sur le terrain de la recherche scientifique, et — dans le cadre de ceux-ci — des moyens juridi-

ques en général, et de ceux du droit civil, en particulier. Au cours de l'explication des moyens du droit civil l'auteur relève le rôle spécifique que le droit civil remplit ou peut éventuellement remplir dans l'avancement du développement scientifico-technique.

Au matériel du chapitre II se lie strictement le chapitre III qui en appliquant une méthode comparative de droit, vaste et bien fondée, présente la pratique de la direction, inspiration et utilisation des recherches par voie contractuelle dans les pays différents. Quoique l'étude entière soit tissée de toute part d'exemples invoqués correctement par la méthode comparative de droit, ce chapitre poursuit expressément le but de présenter la pratique des pays capitalistes et socialistes plus importants — après avoir pris en considération l'application, la possibilité et la finalité de la méthode comparative, ainsi que les facteurs relevants entrant en ligne de compte à la comparaison utilisable dans ce domaine. D'entre les Etats capitalistes l'exposé et la comparaison des méthodes juridiques des Etats-Unis, de la France, de la Grande-Bretagne et de la République Fédérative Allemande sont surtout importants. Dans l'exposé concernant les contrats de recherche il faut relever, en première ligne, l'explication et la comparaison de la pratique respective de l'Union Soviétique, de la République Démocratique Allemande et de la Tchécoslovaquie. L'auteur souligne à part l'importance de l'intégration socialiste en l'occurrence et s'occupe séparément du résumé de la pratique des Etats capitalistes plus importants ainsi que des Etats socialistes relevés. En accentuant la subordination aux systèmes sociaux, ladite comparaison indique que dans l'application des moyens juridiques un très grand nombre de variations peut exister dans ce domaine et c'est ainsi que se présente, par exemple, en guise de contraste bizarre et formel, le fait unique que le droit français, l'adepte par excellence du principe de la liberté contractuelle, fasse appel au contrat administratif, tandis que le dirigisme socialiste — au contrat de recherche de droit civil pur et simple.

Ce matériel comparatif exceptionnellement bien fondé est suivi de l'histoire de la réglementation et de la pratique en Hongrie des contrats de recherche datant d'un passé plutôt bref. Dans ce chapitre IV, après avoir esquissé la situation sous le régime du dirigisme direct d'avant le 1er janvier 1968, l'auteur traite au fond les changements intervenus à la suite de l'introduction du dirigisme indirect ainsi que la nouvelle réglementation juridique, en relevant séparément dans ce cadre le résumé analytique fondé sur de larges recherches de faits effectué par l'Institut des Sciences Juridiques et Politiques de l'Académie des Sciences de Hongrie concernant les contrats de recherche passés à la suite de la réforme en question. Cette recherche bien fondée de faits a fourni un matériel tel concernant l'examen de la situation économique et sociale que l'auteur l'analyse au point de vue de l'efficacité économique et juridique de la nouvelle réglementation, et édifiera sur le même tout son exposé dans la suite de son ouvrage.

La troisième partie de l'œuvre comprend également plusieurs chapitres (V—VII). Cette partie présente le contrat de recherche comme rapport juridique, le trait dynamique ici à l'opposé du trait statique antérieur, pour ainsi dire. Le chapitre V, très approfondi, s'occupe des sujets qui participent dans la coopération de recherche. En partant des positions de la recherche, l'auteur examine très justement d'une manière séparée les sujets juridiques en position de mandant, ou en celle de rechercheur, respectivement. En la position de mandant, ce sont, en première ligne, l'utilisateur direct et l'Etat en guise de commandant des recherches, qui puissent être considérés les deux mandants les plus importants. En la position de rechercheur, à côté des institutions de recherche, des universités et des entreprises, c'est la partie concernant la mise

en évidence du rôle du rechercheur individuel qui mérite une attention particulière. Les recherches modernes se font, sans aucun doute, dans une mesure de plus en plus grande comme travail collectif. Cependant, pour le mandant il n'est pas indifférent du tout de savoir, qui sont les personnes, qui exécutent ce travail collectif, respectivement de quelles qualités individuelles certains rechercheurs disposent-ils qui y participent parmi d'autres. Aussi les contrats contiennent-ils en maintes occasions la clause qu'on compte avec la participation dans la recherche de certains rechercheurs indiqués personnellement.

Le chapitre VI s'occupe de l'objet, du contenu, de la formation, modification et expiration du contrat de recherche. En connexion avec l'objet et le contenu du contrat de recherche l'auteur met en relief d'une manière catégorique la prestation principale du rechercheur comme l'objet qualificatif de ce contrat. Après l'explication de la formation, de la modification, de l'expiration et même de la vie ultérieure du contrat, les constatations concernant l'analyse multilatérale de la collaboration d'entre les parties sont d'une importance spéciale.

On trouve, de même, des explications exceptionnellement profondes et subtiles dans le chapitre VII qui traite l'exécution des contrats de recherche ainsi que les questions concernant la violation du contrat. Dans cette sphère, je voudrais de nouveau mettre en évidence, comme un mérite exceptionnel de l'auteur, la mise en relief dans son ouvrage de l'importance de l'élément personnel et de la compétence professionnelle; ensuite — et surtout en connexion avec la violation du contrat par exécution défectueuse — la lueur de la conception gagnant lentement du terrain et projetée ici également en perspective, qui détermine l'auteur de faire des distinctions de plus en plus vigoureuses en ce qui concerne les spécificités différentes des contrats de recherche de type mandat ou d'entreprise, respectivement. En la matière des contrats de recherche le facteur d'incertitude se présente d'une mesure plus grande que dans la sphère des contrats de marchandises de tous les jours. En conséquence de ce fait, l'auteur met — très justement — en évidence les possibilités différentes, en partie, et dérivant des spécificités de la violation de contrat, ainsi que les possibilités de la charge de péril juridique et de la sanction correspondant au fond à la charge de risque.

La quatrième partie de la monographie, nommément le chapitre VIII, constitue — à mon modeste avis — le comble de toutes ces explications fascinantes. Cette partie s'occupe du type et du lieu du contrat de recherche, dans le système des contrats. C'est d'une mode imposante que l'auteur entame ce chapitre sur le rôle des types de contrat par ce qu'il écrit sur les critères de la formation et de la systématisation des types. Dans le domaine de la formation et de la systématisation des types il remarque justement l'unilatéralité des théories déductives d'un seul facteur et — en adoptant l'utilisation combinée — c'est la structure de la prestation qu'il considère d'une importance primaire.

En analysant les tentatives qui s'efforcent de placer les contrats de recherche parmi les uns ou les autres des types de contrat traditionnels (contrats économiques, de mandat, d'entreprise, de société ou d'administration publique), il arrive à la fin à un type de contrat sui generis.

Les explications exceptionnellement substantielles de l'auteur expriment au fond qu'ils considère de sa part, l'activité de sa part, l'activité dans la sphère des contrats de recherche comme ayant en première ligne un caractère de mandat; mais que le type d'entreprise peut d'ailleurs également jouer un rôle non moins important. Naturellement — en rapport avec les conditions données — le contrat de société peut avoir aussi un certain rôle. En rapport avec l'activité de recherche donnée, le contrat de recherche

peut donc être, le cas échéant, un type approchant des types traditionnels de contrat différents, ou peut même y être compris. C'est le contrat de type de mandat qui est le plus fréquent, et sur ce point l'auteur a parfaitement raison aussi. Cependant, puisque — précisément en rapport avec le caractère et l'activité de la recherche, avec les nécessités du mandant ou du client, finalement avec l'efficacité présumée — la forme de différents type de contrat peut entrer en ligne de compte, l'auteur est de l'avis qu'il faudrait, au fond, codifier le contrat de recherche comme un type de contrat indépendant, tel qui — vu son voisinage direct avec les œuvres intellectuelles — pourrait être placé dans cette sphère même. L'argumentation de l'auteur est bien convaincante qu'on devrait classer les contrats de recherche, ensemble avec les droits de brevet d'invention, dans la sphère des œuvres intellectuelles; semblablement à la réglementation même de ces contrats (mais pas à celle des obligations de résultat), qui se dirigent vers la réalisation des résultats déjà obtenus, mais les précèdent chronologiquement.

C'est le chapitre IX de l'ouvrage qui, constituant la partie finale de la monographie dissout, pour ainsi dire, les excitations subtiles de la réflexion et s'occupe des moyens servant à l'introduction des résultats de recherche. Ce chapitre approche le problème également de plusieurs côtés. Les rapports généraux de la réalisation et de l'assimilation des résultats scientifico-techniques sont suivis par des explications présentant les méthodes contractuelles de l'introduction pratique des résultats de recherche. Tandis que les préoccupations d'une partie importante des contrats de recherche tendent précisément à produire, par la voie de la recherche scientifique, de nouveaux résultats scientifico-technique, dont plusieurs remplissent en même temps les critères des brevets d'invention, ici c'est plutôt la recherche du contrôle, de l'utilisation et de l'assimilation pratiques des résultats de recherche déjà réalisés qui constitue l'objectif central à résoudre. Le premier contrat de recherche précède, le dernier ne fait que suivre le résultat réalisé au cours de la recherche scientifique.

Ce résultat de recherche lui-même constitue, à la fois, une œuvre intellectuelle. Ainsi donc, dans le contrat de recherche, il faut en général réglementer en outre la question de l'appartenance de l'œuvre intellectuelle qui se produira (ou se produira éventuellement).

Le nouveau résultat, produit au cours de la recherche, devient, en guise d'œuvre intellectuelle, important en première ligne dans l'utilisation et contribue à augmenter surtout le rôle spécial du know-how.

Cette monographie dont le contenu est complètement nouveau dans son genre, puisqu'il n'y a à peine quelques années écoulées depuis que la réglementation de ce nouveau genre de contrat fut accepté par le droit hongrois, expose à un niveau théorique très élevé l'institution entière, et constitue — en débordant le cadre des résultats scientifiques mis plusieurs fois en évidence — un ouvrage très réussi en première ligne par le fait qu'il s'appuie dans le meilleur sens du mot sur les fondements économiques et sociaux et applique — à travers tout l'ouvrage — la méthode comparative de droit, et cela non seulement par la voie du régime juridique international, mais aussi par celle des comparaisons internes, de branche juridique international, mais aussi par celle des comparaisons internes, de branches et d'entre-branches, du régime juridique socialiste hongrois.

L'auteur — plein de modération et de bien-fondé — dépasse de beaucoup l'exposition du thème indiqué dans le titre. Il édifie ses explications théoriques et de dogmatique juridique sur un matériel de faits économique, et hongrois et étranger, ainsi que sur une analyse sociologique profonde. Au cours de ses interprétations juridiques, il rapproche d'une manière audacieuse même en dedans du droit civil, ses observations relatives aux in-

stitutions différentes. En même temps, dans la majorité des cas, il ne se contente pas d'expliquer, mais argumente avec conviction et critique les opinions contraires en démontrant les imperfections et défauts de celles-ci. Les explications d'un haut niveau théorique, qui servent à la fois comme un brillant exemple pour démontrer l'harmonie existant — au bon sens du terme — entre la théorie et la pratique ainsi que pour indiquer les différences et les comparaisons, sont traitées, en même temps et jusqu'au bout, dans un style savoureux et coulant. Cet ouvrage constitue un exemple éclatant que lors de l'élaboration d'un terrain semblant plutôt exigu au premier regard et n'intéressant qu'un cercle restreint de personnes, mais ayant en réalité une importance bien grande, l'auteur est en mesure de relever pour ainsi dire le thème même de son livre par l'aisance de son style, bourré d'un sens pratique et d'une érudition scientifique éminente.

L'ouvrage est complété par un index des noms et thèmes, et par une table des matières en russe et en français. Sa présentation soigneuse fait honneur à la Maison d'édition de l'Académie (Akadémiai Kiadó).

L. Asztalos

Le statut juridique de l'étranger en Hongrie[1]

L'actualité de la monographie découle du fait que sur le plan mondial de plus en plus accroît le nombre des relations de vie où par rapport au régime juridique donné interviennent des personnes étrangères et, par suite, accroît également l'importance des règles définissant le statut juridique des étrangers. Pensons seulement au commerce international s'épanouissant toujours mieux, aux relations culturelles-politiques en plein développement et au tourisme devenu un phénomène universel. C'est la situation surtout en Hongrie où presque 40 pour cent du revenu national se réalise dans le trafic du commerce extérieur et, où — ensemble avec quelques autres pays de l'Europe orientale — également par suite de l'émigration d'un volume important contiennent beaucoup de faits des éléments étrangers (visite de l'ancienne patrie, succession etc.). Ainsi donc, on peut considérer justifiée la décision des rédacteurs de Kiel qui commencent avec la monographie d'un auteur hongrois leur série projetée à faire connaître le statut juridique des étrangers.

L'élaboration de ce thème avec une exigence scientifique relativement peu développée jusqu'ici avait stimulé l'auteur d'examiner en guise d'introduction de plus près le caractère des règles définissant le statut des étrangers. Il constate que « le droit concernant les étrangers consiste dans les règles de la législation intérieure lesquelles dans l'intérêt des rapports normaux interétatiques, mais ouvertement ou d'une manière dissimulée liées à la condition de la réciprocité permettent aux étrangers sur le territoire de l'État l'acquisition des droits et la contraction d'obligations ». Ces règles se sont produites au cours du développement du droit « comme des résultats d'une part de l'autolimitation des États et, d'autre part des efforts d'extension du pouvoir d'État sur les sujets de droit étrangers ».

Ce qui constitue l'objet de l'ouvrage ce sont les rapports de droit hongrois où le sujet est une personne étrangère (il s'agit en premier lieu des rapports de droit des personnes naturelles, mais dans certains rapports examinés — p.e.: licence, trade-mark — peuvent figurer forcément des personnes morales étrangères aussi).

Le résultat de l'examen constitue un

[1] Kolossváry, I.: *Die Rechtsstellung des Ausländers in Ungarn.* Baden-Baden (R.F.A.), Nomos, 1974. 119 p. La monographie est née lors du voyage d'études de l'auteur dans la R.F.A.

profil de droit hongrois pris dans une direction particulière, lequel contient une sélection d'un point de vue particulier tirée des règles presque de toutes les branches du droit hongrois et ainsi également de certaines règles matérielles et de conflits du droit international privé hongrois. Au fond, ce contenu peut être dissous en deux parties du point de vue qu'il s'agisse des règles juridiques positives assurant des droits particuliers ou bien prévoyant des obligations particulières *ayant trait seulement aux étrangers* (p.e. le statut juridique des diplomates) ou bien des règles de droit *générales hongroises ayant trait aussi aux étrangers* (p.ex. le droit de la propriété).

La méthode de l'auteur résulte du caractère de l'objet examiné. Il fait connaître les règles non pas groupées suivant les diverses branches du système juridique, mais tout d'abord il fait une distinction suivant la qualité des différentes personnes touchées potentiellement et c'est ainsi qu'il parle des droits et des obligations des étrangers étant soumis dans la qualité de diplomate à la vigueur du droit hongrois. Ensuite il discute séparément les règles de droit hongrois qui peuvent toucher toutes les personnes étrangères. A l'intérieur de ce dernier groupe il traite la matière selon les conditions de vie, les situations de vie possibles des étrangers, dans le fond depuis la naissance (sujet de droit) jusqu'à la mort (droit de succession). Ainsi s'est formée la construction finale de l'ouvrage: après l'exposé de la notion des étrangers et des règles de la nationalité hongroise l'auteur présente le statut des diplomates puis, après les règles spéciales concernant les émigrants, les immigrants et les personnes sans nationalité, suit la quatrième partie — la plus étendue — intitulée: le statut de droit privé des étrangers. Pour finir, l'auteur aborde le statut de droit pénal des étrangers.

La monographie détermine la notion de la *qualité étrangère* par l'exposé des règles de la nationalité hongroise basées sur le principe de ius sanguinis. Au cours de ses développements il fait entrer en ligne de compte les règles de la double (multiple) nationalité et de la renaturalisation de ces règles importantes et pratiques à cause des vagues d'émigration fréquentes.

L'exposé du statut, de l'immunité et des privilèges des *diplomates* est introduit par l'auteur avec un court rappel d'histoire juridique. Il constate que les diplomates ne jouissent pas d'exterritorialité et, qu'ils sont exempts seulement de la juridiction hongroise, mais non pas du régime juridique hongrois. Le chapitre traitant entre autres les immunités personnelles et réelles, l'immunité d'information et l'exonération des charges publiques est surtout utile grâce aux renvois de l'auteur à nombreuses sources de droit.

Pour les émigrants, c'est-à-dire pour ceux qui changent la nationalité hongroise et la nationalité étrangère, en dehors de l'exposé sur l'amnistie de droit pénal de 1963, c'est la présentation des conséquences patrimoniales qui est surtout digne d'attention dans le chapitre suivant. Ainsi, suivant le décret-loi n° 4 de 1963 et selon les réglementations s'y rattachant, représentant au fond une ligne de démarcation également du point de vue de conséquences patrimoniales pour ceux qui franchissent sans autorisation la frontière ou bien refusent illégalement la rentrée : les dissidents d'avant 1963 sont en essence déchargés des rétorsions patrimoniales, tandis que les derniers dissidents sont exposés à la possibilité de la confiscation de leurs biens.

Le chapitre traitant *le statut de droit privé des étrangers* expose d'abord les droits des personnes et, après les règles concernant la capacité de droit, la capacité d'exercice des droits et la capacité de commettre un délit, et puis telles questions spéciales comme la reconnaissance des titres et des qualifications scientifiques. En connexité avec cela il présente aussi une spécification sur les conventions interétatiques faisant superflue en Hongrie la ratification en relation avec les États

en cause. La partie s'occupant de la propriété intellectuelle constitue en soi-même un tout entier: l'exposé des dispositions les plus importantes relatives à ce sujet, prévues par des conventions internationales et par le droit intérieur embrasse le contenu et le cadre presque complets de la propriété intellectuelle des étrangers en Hongrie. La présentation des règles prohibitant la concurrence déloyale est utile pour le lecteur hongrois aussi, car elle attire l'attention à la nécessité du faire-valoir ces règles plus accentuées. (Ainsi p.e. les règles légales de la réclame — la loi V de 1923.)

La partie concernant le droit des biens contient des informations fondamentales relatives à telles règles du droit hongrois qui sont valables également pour les étrangers: le droit de propriété en général et surtout les limitations antérieures et celles entrées plus récemment en vigueur concernant l'acquisition des immeubles. Ce n'est pas la faute de l'auteur qu'après la clôture du livre, à cause du développement dynamique des relations sociales, de nouvelles dispositions sont entrées en vigueur, précisément dans le domaine spécial des limitations de la propriété d'immeubles.

La réglementation hongroise du droit sur les devises touchant de près les relations patrimoniales des étrangers était très démembrée et souvent contradictoire.

L'image composée par l'auteur sur les prohibitions et les obligations reflète également exactement les intentions, la politique hongroise des changes et les possibilités d'action des étrangers en matière du commerce des devises. Les règles juridiques ayant pour objet le mouvement des devises ont été codifiées de nouveau au commencement de 1974 (le décret-loi n° 1) précisément pour des raisons mentionnées ci-dessus et en connexité avec le développement des rapports de base, mais ce fait ne changeait point les éléments principaux de l'image mentionnée.

La force de la partie de l'ouvrage sur le droit successoral réside, en dehors des définitions claires et essentielles — et c'est par ailleurs caractéristique pour l'ouvrage entier — dans l'exposé des conventions internationales et dans l'analyse des traits communs et différents de ces dernières. Le caractère illimité du droit de succession des étrangers et les restrictions relatives à l'exportation de la succession sous le rapport du mouvement des devises sont également dûment éclaircies.

Dans le chapitre sur le droit de la famille, après avoir traité les conditions de droit matériel du mariage où les rapports avec des étrangers leur droit national est en essence dominant, limité seulement par l'ordre public hongrois, l'auteur détermine le droit compétent des rapports juridiques du mariage aussi. Parmi ces dernières règles juridiques quelques règles du droit international de la famille sont sans doute problématiques, ainsi p. e. la question de savoir si à l'établissement de la paternité c'est le droit national du père de l'enfant en vigueur à l'époque de la naissance de l'enfant qui est compétent. (Il est possible, en effet, que dans le droit national du père naturel l'établissement judiciaire de la paternité n'est pas connu.) Sur la base des conventions d'assistance judiciaire et des règles judiciaires hongroises, l'ouvrage présente également les cas dans lesquels dans les affaires juridiques des personnes hongroises la justice étrangère est également compétente de procéder, respectivement ces cas dans lesquels la justice hongroise possède une compétence aussi.

Après l'exposé de la procédure judiciaire et extrajudiciaire des règles internationales hongroises (p. e. l'exemption de frais et la garantie des frais de justice, la reconnaissance et l'exécution des jugements étrangers) l'ouvrage se termine avec les faits déterminés par le code pénal hongrois, les faits réalisables également en dehors du territoire de la compétence de la justice hongroise. Le chapitre traitant le droit pénal est complété par les règles du droit de la procédure

pénale de caractère international et par les dispositions concernant l'extradition.

En résumé, l'on peut constater que l'auteur a très justement choisi le niveau de ses examens et a également évité le danger (vu la désuétude rapide) d'un exposé descendant jusqu'au niveau de l'explication des règles d'exécution et a évité la faute d'un trop large exposé aussi. (En effet, l'information ne doit pas être basée sur des cas litigieux.) L'auteur n'est pas reponsable du fait que dans le temps passé entre la clôture de l'ouvrage et sa publication retardée non-imputable à l'auteur quelques détails de la matière traitée, p.e. le droit du mouvement des devises se sont changés.

Cette monographie peut être utilisée comme manuel aussi par ceux qui s'occupent des affaires juridiques et — surtout après la publication du code du droit international privé — au point de vue de ce terrain de droit digne d'être étudié davantage, elle a chez nous sans doute un caractère de pionnier.

P. GYERTYÁNFY

Informationes

The Legal Status and Principal Functions of the Council of Ministers as defined by the amended Constitution of the Hungarian People's Republic

I. Character and purpose of the Council of Ministers

Before the extensive reform of the Hungarian Constitution by Act I of 1972 within the scope of the central organs performing governmental functions *a clear-cut line was drawn* by the Constitution between the supreme organs of the sovereign power, viz. the Legislature and the Presidial Council on the one part, and the Council of Ministers, at that time *the supreme organ of public administration*, on the other.

The amended Constitution does not intend to lay stress upon the differences between the types of central political organs. Although the Constitution fully guarantees the political subordination of the Presidium and the Council of Ministers to the Legislature, in the designation of duties and rights of these organs the Constitution emphasizes their actual functions and their defining, controlling, influencing, sponsoring and executive roles in respect of one another rather than their differences by types. The amended Constitution carried out far-reaching modifications in the sphere of authority of the Legislature, the Presidium and the Council of Ministers and at the same time has extended the scope of functions and the competence of all three organs.

The 1972 reform of the Constitution has on the ground of the experiences gained from the functions the Council of Ministers abandoned the idea as if the Council of Ministers were merely the supreme organ of public administration. In Hungary the Council of Ministers is the supreme operative body of political leadership which as the *Government of the Hungarian People's Republic co-ordinates, influences, and guides, the entirety of the building of socialist society being organized by the State.*

The omission of the administrative character of the Council of Ministers in the amended Constitution does not mean as if the Council of Ministers had ceased to exercise guiding and supervisory powers over the state administration as a whole, moreover within the scope of these powers the Council of Ministers takes decisions of administrative nature as well. Notwithstanding on the ground of its functions discharged in the central guidance and organization of political work and the politically organized economic and social life, in the operations of the Council of Ministers the *governmental activities* are predominant and its organizational character is expressed by the term "*government*" with greater accuracy.[1]

[1] In Hungarian literature on political law for the first time Professor *István Kovács* distinguished the governmental activities of the Council of Ministers from those displayed in the scope of supreme guidance and supervision of public administration. See: KOVÁCS, I.: *A Minisztertanács működési területei és helye az állami szervek rendszerében* (The scope of operation of the Council of Ministers and its place in the system of political organs). Állam és Igazgatás, 5/1956. pp. 332—347. Cf. BIHARI, O.: *A szocialista államszervezet alkotmányos modelljei* (Constitutional models of the socialist political organization). Budapest, Közgazdasági és Jogi Könyvkiadó, 1969. pp. 205—243. ÁDÁM, A.: *A Minisztertanács helye és szerepe az állami szervek rendszerében* (The place and role of the Council of Ministers in the system of state organs). Állam és Igazgatás 12/1971. pp. 1101—1112.

The Council of Ministers receives its mandate from the Parliament. The President of the Council of Ministers and its member are elected and relieved by the Parliament on the recommendation of the Presidium. For its operations the Council of Ministers is responsible to the Parliament. It is bound to regularly render account of its operations to the Parliament.[2] The Council of Ministers performs dual functions in respect of the Parliament. By its manifold preparatory, organizatory, co-ordinating, informative and initiative activities, it assists the supreme representative organ in its legislative activities, drawing up the national economic plan and the state budget, and in the efficient performance of its other functions on the one hand, and takes care of the implementation of the political objectives approved by the Parliament, of the legislative acts and other normative decisions and resolutions passed by the Parliament. In compliance with the duties and rights of the presidium, the Council of Ministers discharges similar functions with respect to the Presidium.

II. Principal tasks and rights of the Council of Ministers

1. In formulating the home and foreign policy of the Hungarian People's Republic *the Council of Ministers performs initiative and creative functions.* As a matter of fact state policy is built directly on governmental policy. The political ideas formulated by the Council of Ministers are appraised and confirmed by the Parliament on the ground of the regular accounts rendered by the Council of Ministers. In laying down the Hungarian and foreign political concepts of the Government, the Government programme occupies a prominent position. By virtue of the amended Constitution the Government programme is debated on, and approved by the Parliament.

Internal politics, as formulated by the Government and confirmed by the Parliament is composed by several components. The principal items of internal politics are economy, scientific and cultural policy, public hygiene and social policy, the administration of justice and public administration.

2. The most important function and task of the governmental activities of the Council of Ministers is *co-ordination.* The growth of the number of governmental tasks, the expansion and specialization of the governmental organization, the intensification of the division of labour in the government, the growth of the number of forms of activities serving the achievement of governmental targets, the manifold relationship between the problems to be solved, on all levels of governmental work, thrust into prominence the importance of exploring the points of contact in governmental work and of the co-ordinating work relying on the essential interrelations in the highest levels of government. The demand for co-ordination manifests itself to a still higher degree in the activities of the Council of Ministers, whose activities embrace the entirety of the work of economic construction and of shaping society organized by the State. The co-ordinating functions of the Council of Ministers extends to the co-ordination of the targets as for their content and order of succession, the establishment of the ratios and the rate of implementation, the co-ordinated elaboration of the means for the promotion of the achievement of the targets. No doubt, the Council of Ministers cannot fulfil its quasi-scientific co-ordinating functions with success unless it makes use of the latest achievements of science at the formulation of its decisions. Corporate work of the Council of Ministers presupposes preparatory activities relying on an adequate amount of information, accurate calculations before taking any decision. In this work an extensive network of functional

[2] According to the standing orders of the Parliament the account of the Council of Ministers is submitted by the President of the Council of Ministers to the Parliament. The account is to be handed over to the permanent committee having competence in the subject-matter of the account before the parliamentary debate.

and sectoral organs take part in subordination to the Council of Ministers.

3. While drafting the constitutional reform ample use was made of experience accumulated *in the exercise of its rights in the domain of foreign politics*. Before the reform the Constitution the right of signing and ratifying treaties and international conventions and agreements had exclusively fallen within the authority of the Presidium. Notwithstanding this provision in addition to international agreements and conventions signed by virtue of authorization of the Presidium there had been others signed by virtue of authority conferred by the Council of Ministers. Following the practice in international relations the amended Constitution, similarly to the Constitutions of several other socialist countries, authorizes in addition to the Presidium also the Council of Ministers to conclude and approve international treaties.

The Council of Ministers draws up or orders to prepare decisions on foreign politics which by virtue of the Constitution, or in compliance with established custom the final decision falls within the competence of the Parliament or the Presidium. Clause (2) of Article 5 of the Constitution lays down as the fundamental principle of the Hungarian foreign policy that the Hungarian People's Republic as member of the socialist world promotes and strengthens her friendly relations with other socialist countries, endeavours to co-operation with all peoples and countries of the world for peace and the progress of mankind.

4. A *de facto* performed function of the Council of Ministers is the guidance of national defence on a governmental level. In strength of Clause (1) of Article 5 of the Constitution as one of its fundamental functions "the Hungarian People's Republic defends the freedom and power of the working people, the independence of the country . . .". Under Article 7 of the Constitution one of the ends the direction and control of planned national economy is the increase of the defence power of the country. The amended Constitution gives expression in general terms, yet in a definite manner to the prominent part of the Council of Ministers in the guidance and organization of national defence, declaring that the Council of Ministers "protects and safeguards state organization and social order . . .".

5. Among the manifold functions of the Council of Ministers, *the thoroughgoing guidance and organization* of national economy occupies a central position and influences the performance of other state functions, as well. The political decisions and provisions of law relating to the reform of the management of national economy have raised new demands from the managing organs of national economy, among these in the first place with regard to the managerial activities of the Council of Ministers. The prominent part of the Council of Ministers in the management of national economics is clearly expressed by the amended Constitution when it declares that *the Council of Ministers makes provisions for the drawing up of the national economic plan and takes care of its implementation.*[3]

The Council of Ministers is in charge of the policy-making supervision of economic planning and the implementation of the national economic plan, in the first place, by the formulation of guiding principles of economic policy and their approval. In the system of economic planning, as one of its organic part, *regional planning* has come into prominence. Act II of 1970 on the Fourth Five-Year Plan in a separate chapter, viz. Chapter VIII, specifies the targets of regional development. In 1971 the Council of Ministers passed a separate resolution on regional planning and on the system of regional development plans.[4] In

[3] According to Act VII of 1972 on National Economic Planning the annual economic plan is to be approved by the Council of Ministers. On the approval of medium- and long-range plans the Parliament decides.

[4] Cf. Government Resolution No. 2006/1971. (III. 17.) Korm.

the spirit of the provisions of the Council of Ministers promulgated its resolution No. 1007/1971. (III. 16.) "On the development scheme of the national network of settlements." Government resolution No. 1006/1971 (III. 16) on the principles of regional development is destined to promote regional development work.

For the promotion of the enforcement of the implementation of national economic plans the Council of Ministers specifies the system of economic incentives, passes important decisions on price and wages policy, on labour force economy, marketing of produce, etc., and establishes the principles of credit policy.

6. The amended Constitution specifies as a function of major importance of the Council of Ministers the setting of the targets of scientific and cultural development. Accordingly the Council of Ministers *provides for the personal and material conditions of scientific and cultural development, makes available the personal and financial condition necessary thereto, determine the system of social and health service and finances this service.* The social political background and framework of these activities of the Council of Ministers were formulated by the provisions of the Constitution qualifying scientific and cultural development, well-developed social and health service as the fundamental functions of the Hungarian People's Republic.

7. The scope of authority of the Council of Ministers was considerably extended by Act I of 1971 on Local Councils. The Act did away with the sharp distinction which had earlier existed between the councils as the organs of state power, on the one hand and the executive committees and the specialized department of the councils as organs of state administration. Together with the other agencies of the councils the Act qualifies both the councils and the organs of the councils as representative self-government and administrative organs. This new definition of the character of the organs of the councils helped to do away with the duality in the central guidance of the organs of the councils where the general guidance of the councils as organs of the state power had fallen within the authority of the supreme organ of the state power, that is, the Presidium, whereas the central guidance of the executive committees was assigned to the supreme organ of public administration, the Council of Ministers.

Both the Act on Local Councils and the amended Constitution entrusted the Council of Ministers with the central policy-making guidance and the supreme control over the legality of the activity of the local councils. Chapter X of the Local Council Act defines in detail the rights and duties of the Council of Ministers in the guidance of the organs of the councils. The Council of Ministers carries out the general policy-making guidance, the central control over the legality, and the central management of the executive committees of the Councils co-operating with the competent office of the Council of Ministers.

8. In addition to other state organs the Council of Ministers too plays an important part in safeguarding *socialist legality* and in protecting the interests of society. In conformity with the Constitution the Council of Ministers guarantees the enforcement of the Acts and Law-Decrees, and cancels or amends any provision, decision or measure of the *subordinate organs* which is in conflict with the law, or infringes public interests. Hence in respect of the acts of the subordinate organs the Council of Ministers exercises extensive rights of cassation and amendment on ground of illegality or for the reason of *expediency*.

9. Even after the reform, the Constitution has preserved the original provisions which empower the Council of Ministers to take action, directly or through anyone of its members, in matters coming within the authority of state administration, further to draw any branch of public administration within its direct authority and to organize special organs to carry out this function. These provisions of the Constitution bear the stamp of guarantees and

find application in practice on very rare occasions only.

10. Simultaneously with the development of the functions of the state and of the socialist democracy also the co-operation of the Council of Ministers with the central organs of *social organizations and movements* expands and improves. The Council of Ministers often calls upon these organs for assistance and co-operation in the achievement of governmental goals of public interest. Preliminary consultation, mutual proposals and recommendations, joint or co-ordinated study of problems of common interest, joint sessions, promulgation of resolutions made with the approval or in agreement with another organ are expedients more and more often applied in course of the co-operation between the Council of Ministers and social organs and organizations of political nature.

When the Constitution declares that "the Council of Ministers in the discharge of its duties co-operates with the social organizations concerned", it lays down this thesis as a constitutional reality and a postulate to be met also in the future.

11. In strength of the closing provisions of the Constitution the scope of duties of the Council of Ministers includes the enforcement of the Constitution, and within this scope the drafting of bills for the enforcement of the Constitution and their tabling in the Parliament. In addition to the Council of Ministers the Presidium, the committees of the Legislature and anyone of its members may initiate legislation. In addition to the co-ordination of the drafting of Bills and Law-decrees the Council of Ministers *may issue decrees and normative resolutions within its own authority.*

12. Similarly to delimiting the competence of the Presidium the amended Constitution also defines the most important rights and obligations of the Council of Ministers, and after enumerating them declares that in addition to them the Government "discharges all functions which a provision of law refers to its competence".

Owing to their large number the special functions assigned to the competence of the Council of Ministers cannot be enumerated here. However, special mention has to be made of the extensive powers of the Council of Ministers as to the appointments to various posts, the institution of honours and distinctions and of awarding these, superintendence over the Hungarian Academy of Sciences, the supervision of the legality of the activities of national representative organs of co-operatives and of the National Council of Co-operatives, the organization and dissolution of university faculties, and the extensive right of territorial organization guaranteed by the Local Council Act. To the co-ordinating and supervisory functions of the Council of Ministers the rights are attached through the exercise of which the Council of Ministers decides controversies between certain state organs on the one hand, and between certain social organs and state organs, on the other.

III. Organs and members of the Council of Ministers and the secretaries of state

1. The amended Constitution authorizes the Council of Ministers to organize *government committees* to perform special functions. Although earlier the Constitution contained no provisions on government committees, the Council of Ministers had organized such commissions even before the amendment of the Constitution. Among these the Economic Committee of the Council of Ministers, the Committee of Scientific Policy, the Committee for International Economic Relations and the Defence Committee occupy a prominent position. It is to be expected that by virtue of the new provisions taken up in the Constitution the Council of Ministers will uphold its provisions ruling government committees.

2. Of the government employees under ministerial rank directly subordinated to the Council of Ministers the *Secretaries of State* occupy a distinguished position. The institution of Secretaries of State has been

introduced by Law-decree No. 5 of 1968. The post has gained in importance, on strength of several provisions of the amended Constitution dealing with the position of the Secretaries of State. In addition to the members of the Council of Ministers also the Secretaries of State are responsible to the Council of Ministers and to the Parliament. The Secretaries of State are bound to render account of their activities to the Council of Ministers as well as to the Parliament. The Secretary of State in charge of an organ of all-national competence may within the scope defined by the Council of Ministers issue regulations and instructions binding upon the state organs, enterprises, co-operatives and other economic organizations. These have to be promulgated in the official gazette.

3. The constitutional reform developed further the provisions on the responsibility of the members of the Council of Ministers and of the Secretaries of State. In addition to the political responsibility of the Council of Ministers as a body to the Parliament both the members and the employees of the Council of Ministers *are responsible and bound to render account of their activities to the Parliament.* According to a new provision of the Constitution, besides their responsibility to the Legislature, the members of the Council of Ministers, hereincluded its employees, and the Secretaries of State, *are responsible also to the Council of Ministers and are bound to render account of their activities also to the Government.* Obviously the Council of Ministers is not merely a totality of the members constituting it, but also a collective central state organ, which performs guiding and supervisory functions in respect of its members, as well, and may pass resolutions binding them.

The Constitution decrees that a separate Act will regulate the legal status of the members of the Council of Ministers and the Secretaries of State, and the method of their being called to account.[5] Within the responsibility of the above mentioned functionaries the political and eventual disciplinary responsibility to the Parliament and the Council of Ministers — the most significant sanction of which is the dismissal of such functionaries — is to be distinguished from the legal responsibility (mainly under criminal law and civil law) in general. In view of the prominent position of those concerned, their legal responsibility may have qualified forms. Even a specific procedural order of their being called to account is imaginable, so the making of the institution of proceedings dependent on special conditions, etc. However, these differences cannot amount to privileges, and cannot infringe the principle of the equality of the citizens before the law as guaranteed by the Constitution.

[5] In the meantime was published the Act III of 1973 on the legal status and the responsibility of Ministers and the Secretaries of State.

A. ÁDÁM

Комиссии по организации деятельности Советов Будапешта

В Венгрии законом № 1 от 1971 г. о Советах был введён новый институт в систему Советов: закон в обязательном порядке предусматривает образование т. н. комиссий по организации деятельности Советов. В законах от 1950 и 1954 гг. о Советах не было предусмотрено образование таких постоянных комиссий.

Комиссия по организации деятельности столичного Совета первый раз была создана 11 мая 1971, на первой сессии Совета, избранного на всеобщих выборах 1971 г.; 22 районных в столице Совета образовали в первый раз тоже весной 1971 свои комиссии по организации деятельности.

X съезд ВСРП решительно установил

требование ещё более мощного развития государственной жизни и социалистической демократии и стремлений, направленных — после заложения основ социализма — на строительство развитого социалистического общества. И это требование вызвало — в связи с изменением конституции (закон № 1 от 1972 г.) и созданием нового, третьего закона о Советах — необходимость нового во многих отношениях регулирования системы и правового положения комиссий Советов и, в связи с этим, образования новых коллегиальных органов — комиссий по организации деятельности Советов.

Характер комиссии по организации деятельности, как комиссии Совета, определяется следующими признаками:

а) По отношению к сроку полномочия Совета комиссия является *постоянной* комиссией. Она образуется для осуществления «постоянных задач» (в отход временным комиссиям) и срок её полномочия устанавливается на весь период деятельности избранного Совета;

б) С точки зрения цели образования — *обязательная* в силу закона *комиссия*. Выделение решения о создании комиссии из компетенции Совета на принятие решений стало необходимым потому, что деятельность комиссии, ввиду её круга обязанностей, «необходима» (как официальное обоснование к закону о Советах ссылается на это);

в) В отношении организации комиссии: специальные положения относятся к её *составу и лицу членов;*

г) на основе своего места в системе Совета и отношения к задачам Совета комиссия является *функциональной* (а не отраслевой, как большинство постоянных комиссий);

Последние два признака стоит рассмотреть подробнее.

2. С *организационной* точки зрения комиссия по организации деятельности является комиссией *единого* характера. В комиссиях по организации деятельности Советов Будапешта не были созданы постоянно действующие *подкомиссии*. Однако во многих случаях был прецедент на то, что в целях выполнения определённых задач (напр. рассмотрения дел депутатской несовместимости) эти комиссии образовали из числа своих членов временные подкомиссии.

Ряд специфических черт наблюдается в отношении *членов* комиссий по организации деятельности и практического опыта этой области.

Прежде всего обращает внимание на себя то, что членами комиссии по организации деятельности (и ревизионной комиссии) могут быть — в отличие от других постоянных комиссий — только депутаты Совета (абз. 1 и 2 § 59 закона о Советах). Кандидаты органов, действующих на территории Совета, и другие специалисты — поскольку они не входят в число депутатов Совета — не могут быть избраны членами комиссии по организации деятельности.

Подобным образом достойны внимания *исключающие положения*, относящиеся к членам комиссии. В состав комиссии по организации деятельности не могут быть избраны должностные лица Совета (председатель, его заместители и секретарь исполнительного комитета).

Ограничительные положения, связанные с членами комиссии по организации деятельности, являются *гарантийными по природе*. Они служат тому, чтобы в повышенной мере обеспечить полную независимость, самостоятельность и невнушаемость комиссии, выполняющей своеобразные функции, и всех её членов.

Численный состав комиссии по организации деятельности не устанавливается особым положением закона. Согласно общему положению закона (абз. 1 § 60) комиссия — как и другие постоянные комиссии Совета — должна состоять не менее из трёх членов. В Будапеште действительный численный состав этих комиссий — 3—7 членов в общем.

Практический опыт показывает, что трёхчленная комиссия по организации деятельности не может соответствующим образом выполнять свои функции. Даже деятельность комиссий по организации деятельности, состоящих из 5 членов, часто

затрудняет временный выпад некоторых членов или же — и с этим тоже надо считаться — отсутствие соответствующей активности и готовности к участию. В дальнейшем желательно было бы образовать комиссии по организации деятельности в составе не менее 5, но ещё больше 7 членов.

Состав комиссий по организации деятельности имеет интересные черты с точки зрения *профессий* и образования. В этом отношении заметна роль *юристов* в деятельности Советов. 5 из 7 членов комиссии по организации деятельности столичного Совета имеют юридическое образование. Подавляющее большинство председателей (16 из 22) комиссий по организации деятельности районных в столице Советов тоже юристы.

Такое положение состава по профессии очевидно связано с кругом задач комиссий по организации деятельности и отражает правильное стремление Советов, направленное на рациональное использование знания дела. В то же время бывает — в результате стеснённого положения, вытекающего из условий района — что в некоторых районных в Будапеште Советах ни один юрист не является членом комиссии по организации деятельности.

3. К *кругу задач* комиссии по организации деятельности также относится характеристика, которую закон о Советах сформулировал о коммиссиях Советов: комиссии являются органами Совета, вносящими предложения, дающими отзывы, подготовливающими и проверяющими, согласовающими. Естественно, что в отдельных комиссиях Советов — соответственно характеру и правовому положению данной комиссии — некоторые из этих обобщённых черт обозначаются чётко, а другие — менее отчётливо. Деятельность комиссий по организации деятельности тоже характеризуется тем, что они интенсивно принимают участие в выполнении некоторых из упомянутых задач, а в выполнении других задач они или совсем не участвуют или участвуют в меньшей мере.

Обязанности комиссий по организации деятельности Советов, входящие в круг их задач, являются — с точки зрения *характера* правового регулирования — частью обязательными, частью факультативными (разрешёнными, возможными) по природе.

Обязательной по закону задачей комиссии по организации деятельности является проверка мандатов депутатов Совета и рассмотрение дел депутатской несовместимости (абз. 1 § 59 закона о Советах). Таким образом, это одновременно и *первоочередные* задачи комиссии по организации деятельности.

Факультативные задачи могут быть разделены на две группы. К первой группе можно причислить две обязанности, основанные на положении закона, выполнение которых Совет может поручить комиссии по организации деятельности: то есть создание и проверка реализации положения об организации и деятельности. Вторую группу составляют задачи, которые Совет направляет без особого полномочия, содержащегося в правовой норме, в пределах своей компетенции — как правило, путём распоряжений собственного положения об организации и деятельности — в обязанность комиссии по организации деятельности. Сюда относятся: задачи, связанные с проведением тайного голосования; подготовка дисциплинарных дел и. др.

4. В практике будапештских комиссий по организации деятельности встретилось относительно мало проблем при выполнении обязательных по закону задач.

На первых сессиях Советов *проверки мандатов* депутатов произошли вполне беспрепятственно. Таково же было положение в отношении как проверки законности мандатов депутатов, избранных на временных довыборах (это произошло в некоторых случаях), так и отчётов Советам об этом.

Тем не менее рассмотрение *дел депутатской несовместимости* поставило несколько вопросов, по которым практику необходимо делать единообразной.

Следует заранее сказать, что по сводному опыту деятельности Советов Будапешта с 1971 года им направили мало заявлений о наличии несовместимости и только в не-

многих случаях приняли решения о лишении полномочий депутатов Советов. Но много примеров было на то, что Совет (секретарь исполнительного комитета) внёс в районную комиссию по организации деятельности такие заявления, которые вовсе не относятся к понятию несовместимости (напр. поведение депутата Совета, как жильца коммунальной квартиры, громкий шум из его квартиры). Комиссии по организации деятельности отвели, правильно, от себя эти дела.

При рассмотрении малочисленных дел действительной депутатской несовместимости в комиссиях по организации деятельности столичного Совета и одного из районных в столице Советов стал спорным вопрос о том, что заявление о наличии несовместимости деятельности, развернутой не в качестве депутата Совета, можно ли рассмотреть по существу, если ещё ведётся раньше возбуждённый уголовный процесс. Ввиду сильной обоснованности заявления комисии по организации деятельности положительно высказались в обоих упомянутых случаях, и Советы приняли их предложения.

В связи с делом депутатской несовместимости поднялся и такой вопрос, что в случае срочности можно ли принять *меры*, являющиеся *промежуточными* по сравнению с результатом предварительного рассмотрения заявления. По предложению комиссии по-организации деятельности столичный Совет стоял на позициях, по которым в данном деле это является целесообразным и одновременно — за отсутствием содержащегося в правовой норме запрета — разрешённым: до принятия окончательного решения о деле депутатской несовместимости Совет *приостановил* членоство в Совете данного лица. По нашему мнению, это решение подходит для того, чтобы лежать в основе формирования будущей практики в тех случаях, когда заявление о наличии несовместимости делает правдоподобными факты, квалифицирующиеся тяжкими, но само рассмотрение требует, повидимому, длительного времени.

Установление несовместимости поставило и вопрос о *праве неприкосновенности* депутатов Советов. Обосновано общее требование, что депутат Совета должен пользоваться повышенной защитой в ходе выполнения своих депутатских обязанностей: гарантии, имеющиеся в законе о Советах, требуют дальнейшего укрепления.

5. Значительную по количеству часть деятельности комиссий по организации деятельности будапештских Советов составило до сих пор выполнение задач, названных выше факультативными, и в то же время с ним связаны самые ценные — на наш взгляд — результаты их деятельности: речь идёт о *положениях об организации и деятельности*.

Общепринята позиция, что в период после принятия в Венгрии закона от 1971 г. о Советах одним из выдающихся результатов деятельности Советов было именно создание положений об организации и деятельности.

Работа комиссий по организации деятельности, касающаяся положений об организациии и деятельности, является довольно многообразной: она начинается с разработки положений об организации и деятельности, продолжается проверкой их реализации, толкованием их постановлений, внесением предложений о привлечении к ответственности за их нарушение и охватывает также внесение предложений о возможных дополнениях и изменениях.

Что касается *выработки* положений об организации и деятельности, прежде всего привлекает внимание на себя, что согласно распоряжениям нового закона о Советах (абз. 1 § 28 ст. 9 § 75) венгерские Советы сами создали свои положения об организации и деятельности, пользуясь общепринятым с тех пор словоупотреблением, «конституцию» жизни Советов.

Комиссии по организации деятельности привлекали к подготовке руководителей отраслевых органов и других специалистов, а также заинтересованные органы, не входящие в Советы. Проект текста положения был обсуждён на совместных заседаниях комиссий по организации деятельности и исполнительных комитетов

и только после этого был внесён в пленум Совета для нового обсуждения и утверждения.

Летом и осенью 1971 г. во всех Советах Будапешта были созданы положения об организации и деятельности; 22 декабря 1971 г. исполнительный комитет столичного Совета уже утвердил все постановления будапештских районных Советов, содержащиеся положения об организации и деятельности.

После вступления в силу положений об организации и деятельности в сфере деятельности комиссий по организация деятельности выдвинулось на первый план выполнение задачи, состоящей в *рассмотрении реализации* положений об организации и деятельности. Однако в этом отношении возник ряд проблем, и в отдельных районных комиссиях по организации деятельности складывалась порой различная практика.

Ныне уже можно прийти к выводу, что рассмотрение реализации положений об организации и деятельности не тождественно обычному понятию *административного контроля*. Для такой деятельности комиссия в се равно не имеет ни сил ни средств. Рассмотрение реализации никак не может дойти до оперативного вмешательства в деятельность рассмотренного органа, являющегося либо коллегиальным органом, либо органом с единоличным руководством.

Тоже не одобримо, когда комиссия по организации деятельности хочет заниматься многими делами (напр. во всей полноте рассматривать реализацию положений об организации и деятельности), ведь в таком случае её установления скользят по поверхности. Комиссия поступает правильно, если свои проверки сосредоточивает *на определенных темах*. В годовом плане комиссии целесообразно установить эти темы *по кругу деятельности* (отрасли работы Совета) или *по органам*. Например, комиссия по организации деятельности столичного Совета предусмотрела в плане своей работы на 1973 год рассмотрение того, что исполнительный комитет как осуществил полномочия, возложенные Советом на него. Несколько районных комиссий по организации деятельности рассмотрело деятельность информационного бюро (или как местами называется, службы информации) и некоторых отраслевых органов, соблюдение сроков делопроизводства, и др.

С рассмотрением реализации положения об организации и деятельности связывается — по линии юридических санкций — право (и одновременно обязанность) комиссии по организации деятельности на *внесение предложения о привлечении к ответственности* за нарушение положения об организации и деятельности. Положение столичного Совета решительно направляет эту задачу в компетенцию комиссии по организации деятельности (п. д) § 103).

По вопросу о возможном *дополнении* или создании нового положения Совет принимает решение на основе предложения комиссии по организации деятельности.

6. Кроме вышеупомянутых комиссии по организации деятельности имеют и *другие* задачи. Эти задачи неодинаково отмечаются в положении об организации и деятельности столичного Совета и в положениях районных в столице Советов.

Столичный Совет направляет в круг задач комиссии по организации деятельности, сверх сказанного, только задачи, связанные с проведением *тайных голосований* Совета (п.е) § 103).

Сверх этого, положения районных Советов возлагают ещё две задачи (вернее полномочия) на комиссию по организацию деятельности:

а) комиссия по организации деятельности контролирует рассмотрение жалоб и представляющих общественный интерес заявлений населения;

б) в интересах выполнения своих задач члены комиссии по организации деятельности могут принять участие на заседаниях других комиссий Совета с правом совещательного голоса.

7. Из подобного описания круга задач комиссий по организации деятельности выявляется, что в ряде случаев они *обязаны сотрудничать* с другими комиссиями Со-

вета. Это вытекает, в первую очередь, из обязанностей, связанных с положениями об организации и деятельности. Выше, в пункте б) необходимость этого только подчёркивается, но и без этого само собой разумеется.

Кроме этого в ходе своей деятельности комиссия по организации деятельности поддерживает *тесную связь* с исполнительным комитетом (главным образом его секретарём), с отделами (в столице главными отделами), в первую очередь с организационными и административными отделами. Уже сделаны шаги для вступления в отношения с некоторыми комиссиями территориальных органов Отечественного народного фронта.

*

В конечном счёте можно установить следующее:

Безусловно оправдалось создание новым законом о Советах комиссий по организации деятельности. Опытом последних лет оправдывается, что новый коллегиальный орган Совета содействует укреплению социалистической демократии, повышению уровня деятельности Советов и её эффективности.

Закон правильно закрепил два основных элемента задач комиссий. Это:

а) юридическая и морально-политическая правильность членства в Совете (сюда относятся проверка мандатов и рассмотрение дел в случае несовместимости деятельности депутата Совета);

б) правильность образования и деятельности Совета и его органов (сюда относятся задачи, связанные с положениями об организации и деятельности).

Что касается деталей, над ними можно и надо думать дальше: в расчёт могут войти упразднение некоторых малозначащих или чуждых профилю задач; более точная и недвусмысленная характеристика методов работы, и наконец, включение дальнейшей обязанности по главной линии задачи (напр. процедура, касающаяся права неприкосновенности); то есть можно говорить о дальнейшем развитии нового правового инстстута, созданного в виде комиссии по организации деятельности, но в дальнейших изменениях нет надобности.

Опыт показывает, что до сих пор комиссии по организации и деятельности, по существу, оправдали надежды.

Л. Неваи

The Psychologist in Criminal Procedure

1. There are two approaches to raising "spontaneous psychology"[1] to the level of consciousness in the mind of those in charge of the administration of justice. The one is: increasing the knowledge of psychology of those in charge of the administration of law, the other: employing psychologists in criminal procedure.

Persons in possession of special professional knowledge may render help to criminal procedure in two ways: they may either give expert opinions as a result of their professional examinations, or co-operate as consultants in taking evidence.

The psychologist consultant may be of invaluable help in organizing certain procedural acts, preparing their tactics, etc. Here we shall confine ourselves to the discussion of certain problems of evidential experiments and of the co-operation of psychologists in interrogations.

In course of taking experimental evidence it may often be necessary to establish whether or not a certain phenomenon was observable from a given site, under given circumstances, whether the witness could have seen the perpetration of a crime from

[1] BÓLYA, L.: *Az igazságügyi pszichológia kialakításának bizonyítástani alapjai a büntetőeljárásban* (Theoretical foundations of the development of forensic psychology in criminal procedure). Jogtudományi Közlöny, 12/1963. p. 637.

the site he has indicated, could have heard the report of the gun, could the suspect have carried out certain act within a definite time, etc.

Obviously, the performance of experimental evidence is one of the principal fields for the employing of professional psychologists to participate in criminal procedure. As a matter of fact those in charge of investigation might be at a loss to assess the effects of the external stimuli on the percipience of the witness. By applying only his general knowledge of the tactics of criminal investigation the investigator attended only to such circumstances as weather conditions or illumination, then the experiment would easily remain unsuccessful.

Much could be added to the value of the experiment, if the minutes taken of it contained the circumstances of observation in an objective subsequently reproducible and appraisable form. Sound, light, etc. are all measurable phenomena, and the efficacy of the experiment could be but improved if the participating consultants gauged and recorded the physical properties of significance for the purpose of evidence.

It is worth to analyze thoroughly the problem of the participation of the psychologist in the interrogation. Both during and after the interrogation the psychologist might with his advices or experiences assist the investigator in the choice of the proper tactical course.

Studies on the tactics of investigation often emphasize that the investigators must establish a personal contact with the subject of their investigation and also that this way may vary dependent on the personality of the interrogatee. Unfortunately there is only very limited amount of advices available for criminal investigators how to get more closely acquainted with the personality of the interrogatee. An experienced psychologist will even without thorough studies of reflexes and other examinations recognize the characteristics of a person easier and sooner than an investigator inexperienced in psychology.

Certain works on the tactics of criminal investigation often suggest that the interrogator should before the interrogation proper have an informal conversation with the interrogatee. This informal conversation may help to relax the initial stress and to create a personal contact between interrogator and interrogatee. It will also help to the closer knowledge of the personality of the interrogatee and to the choice of the proper tactical course The psychologist consultant can direct the course of conversation so as to allow him to explore the limits of the interrogatee's memory important for the purpose of the investigation finding thus the motives on which the interrogator can safely rely in his efforts to persuade the interrogatee to tell the truth.

2. Both the General and Special Part of the Hungarian Criminal Code contain a number of definitions whose applicability to a concrete case may require the special professional skill of the psychologist. Thus e.g. the second item of the definition of non-conscious negligence in § 17 of the Hungarian Criminal Code emphasizes that there will be a case of negligence when the offender fails to foresee the consequences of his act because of the lack of care or circumspection reasonably expected from him. Here the term "from him" refers in the first place to subjective criteria.

Attention is not any separate mental process, but a general feature of inner life (psyche), one of the factors of all mental processes,[2] the gate through which everything from the outer world can reach the human soul.[3] Still in what direction and to what extent this gate can be thrown open in case of a given person and under given circumstances is a question that can be answered in many

[2] TEPLOV, B. M.: *Psychology* (Hungarian translation) Budapest, 1953. p. 49.

[3] Ушинский, К. Д.: *Сочинения* (Ushinski, K. D.: Works). Vol. 10. Moscow, 1950. p. 22.

cases only in the possession of special professional knowledge of psychology, i.e. a question requiring the participation of a professional psychologist.

Threat as a cause excluding or limiting accountability also has its objective and subjective criteria. The subjective criterion consists in the creation of fear in the person threatened of a degree which renders him incapable, or restricts him in the display of an attitude in complying with his will. To the proper assessment of a contingency of this category again the special experience of a professional psychologist is necessary.

Similar considerations will emerge when it comes to determine cases of the excess of the scope of justified self- defence as the consequence of fear or excusable emotion (§ 25/3 of the Hungarian Criminal Code). Cases of this type will not be punishable where fear or excusable emotion rendered the person staving off an unlawful assault incapable of recognizing the extent to which self-defence was justifiable. On the other hand, the punishment may be mitigated without any restriction if his capacity of recognition of the consequences of his act has been narrowed down.

The effect of fear and emotion on the capacity of deliberation also depend on objective and subjective criteria. In the assessment of the interaction of these criteria the expert knowledge of psychologist may have a word to say.

In strength of § 85/1 of the Hungarian Criminal Code juveniles are persons between the age limits of fourteen and eighteen. Accordingly an infant, i.e. a person who at the time of the perpetration of the act has not yet completed his fourteenth year of age cannot be punished. The provisions relating to juveniles have to be applied to those who at the time of the perpetration of the act completed their fourteenth years of age, but did not yet reach their eighteenth years of age.

The precondition of liability under criminal law is the capacity of the offender to recognize the dangerous consequences to society of his act and to act in a criminal way notwithstanding this recognition. However, whereas with adults the want of this capacity, or its limitation, is the consequence of insanity, mental deficiency (imbecillity) or the deranged state of mind, with juveniles it may be associated with a backwardness of mental growth, which has been brought about by temporary, adverse social conditions, or somatic anomalies and cannot be considered a state of insanity or feeble-mindedness. "Der Retardierte kann seinen Entwicklungsrückstand aufholen, der Debile nicht."[4]

The Hungarian Criminal Code, in connection with curative measures, in § 101 draws a line between "mentally deficient" juveniles and idiots. The term mentally deficient does not imply idioticy: it merely embraces juveniles "who owing to reduced intellectual performances caused by disturbances in conduct and adaptation developing in response to adverse environmental conditions and somatic harms"[5] are in need for curative education.

While in matters of idioticy the alienist has to give his expert's opinion, the establishment of mental backwardness requires special professional knowledge of psychology and the assistance of teachers trained in the instruction of backward children. It is for this reason that in accordance with § 301/2 of the Code of Criminal Procedure before decreeing curative education the court has to hear a specialist in the treatment of brackward children.

The Special Part of the Hungarian Criminal Code also contains several provisions the application of which makes the services of a professional psychologist necessary. Cases of this type are grave

[4] GUTJAHR, W.: *Beurteilung der strafrechtlichen Verantwortlichkeit Jugendlicher.* In: Psychologie und Rechtspraxis. Berlin, Ed. H.D. Schmidt und E. Kasielke, 1965. p. 76.

[5] MAJLÁTH, GY.: *A gyógyító nevelés elrendelésével kapcsolatos személyiség-fejlődési problémák az igazságügyi gyógypedagógiai pszichológiai szakértői tevékenységben* (Personality development problems associated with the prescription of curative education in the activities of the forensic psychologist expert of the treatment of backward children). Magyar Jog, 10/1968. p. 616.

mental trauma caused by criminal offences against national, ethnic, racial or religious groups (§ 138 of the Criminal Code), or grave psychological stress caused to a subordinate insulted by his superior (§ 321), or the grave endangerment of the corporal, mental or moral development of a minor by an offence committed against youth (§ 274), or grave emotion (§ 254 of the Criminal Code).

In psychology the sudden forceful flaring up of passions, emotions accompanied by a narrowing down of consciousness are designated as affects. There is a difference between physiological and pathological affects, the former coming within the realm of psychology, the latter within that of psychiatry.

3. The precondition of the differentiated administration of justice is the establishment of the personality type of the accused. In the perpetration of the criminal offence itself a variety of aspects of the personality of the perpetrator manifest themselves. By the side of the study of these aspects "the exploration of the personality of the accused is a self-contained objective in criminal matters".[6] In general, the traits of the personality of the accused are to a satisfactory degree identifiable without the presence of a professional psychologist. Of course there may be exceptional cases. For adults such are e.g. deafness, muteness, blindness, hardness of hearing, deaf-mutism, etc.

There will be even greater need for the employment of experts in order to establish the personality traits of juvenile delinquents. GUTJAHR distinguishes four groups of cases where the co-operation of experts is in particular recommended. These are: "(a) Wenn bei Personen aus der Verwandtschaft des Jugendlichen Geisteskrankheiten, Alkoholismus, Syphilis, auch gehäuft Kriminalität oder andere abnorme Verhaltensweisen auftreten. (b) Wenn die Eltern schwer verwahrlost sind oder erzieherisch versagten; auch wenn häufiger Erzieherwechsel (z. B. in verschiedenen Heimen) eingetreten ist. (c) Wenn beim Jugendlichen Schwierigkeiten bei der Geburt, Gehirnverletzungen, Erkrankungen und Erschütterungen, schwere körperliche Krankheiten angegeben werden, wenn körperliche Entstellungen (z. B. Amputation), Sehschwäche, Schwerhörigkeit angetroffen werden, wenn er Hilfsschüler oder mehrfacher Sitzenbleiber war, wenn er die Arbeitsstelle oft wechselte oder keine Arbeit aufnimmt, wenn er Züge stärkerer Verwahrlosung zeigt oder wegen Schwererziehbarkeit auffällig war. (d) Bei allen schweren Straftaten ... ferner bei allen Straftaten, deren Motive unverständlich, 'persönlichkeitsfremd' oder auch nur nicht aufklärbar sind, schließlich bei allen Sexualdelikten, die mit sogenannten Perversionen zusammenhängen, z.B. Homosexualität".[7]

4. The capacity to give evidence and the question of credibility constitute the next group of problems, which may necessitate the participation of a psychologist.

The complete absence of the capacity of giving evidence is of extremely rare occurrence in practice. Even insane persons are capable of making certain observations and of the correct reproduction of what they have observed.[8] Obviously, however, there are not only extreme departures from the normal mental standards, but also slight ones, or extraordinary circumstances of observation, diseases, etc. where special professional knowledge may be required for the appraisal of the capacity of giving evidence, or of certain items of the evidence. Still the witness can be obliged only in extreme cases to submit himself to an expert's examination. On the one hand, the chances of a successful performance of the psychologi-

[6] CSÉKA, E.: *A megismerési és bizonyítási problematika új vonásai a büntető ügyekben* (New traits of the problem of recognition and evidence in criminal procedure) Jogtudományi Közlöny, 7—8/1969. p. 371.

[7] GUTJAHR, op. cit., pp. 83—84.

[8] MORAVCSIK, E.: *A tanúzási képességről* (On the capacity to give evidence). Magyar Jogászegyesületi Értekezések, No. 35. Budapest, 1907.

cal test would be considerable impaired by the lack of co-operation, or even by the resistance of the person to be tested and on the other hand the readiness of the citizens to given evidence would be adversely influenced if they were obliged to undergo in addition to the legitimate inconveniences of interrogation the witness also of an examination by an expert.

As is known, professional literature distinguishes general and special credibility.

The establishment of general credibility is a weak link in the chain of evidence. The fact that the witness in question is in general reliable does not involve at all as if his evidence in the case had been given with the intention to tell the truth, whereas, a person who in general is not considered to be trustworthy, may tell in a given case the truth. Consequently in practice experts opinions relying more and more on special credibility, i.e. on the veracity of the evidence, are considered more important than general credibility.

On the other hand, the expert cannot assume the functions of the judge:[9] it is not his duty to decide whether or not the evidence is credible. "All that is the function and purpose of an expert's examination of this kind is the professional checking of certain items of the evidence with regard to veracity."[10]

On the other hand in practice a risk may occur that in the expert "der Jagdeifer erwacht"[11] that is, he wants to conduct the interrogation, to appraise the evidence, and to perform the functions of the authorities.[12]

The professional examinaton of the elements of evidence for their credibility may be needed in the first place where witnesses or the injured parties are children or juveniles. And even if generalization for all categories of cases is out of the question "bei Erwachsenen sei es in Ausnahmefällen, bei Kindern und Jugendlichen aber regelmäßig geboten, einen Sachverständigen zuzuziehen."[13] Still there are investigations where the co-operation of an expert psychologist is for practical purposes indispensable. Such cases are in the first place offences to the prejudice of youth, or sexual crimes.

I. KERTÉSZ

[9] Рахунов, Р. Д.: *Теория и практика судебной экспертизы в советском уголовном процессе* (Rakhunov, R. D.: Theory and practice of expert's examinations in Soviet criminal procedure). 2nd ed. Moscow, 1953.

[10] NAGY, I.: *A pszichologus-szakértő közreműködésének lehetőségei a büntetőperbeli tanúbizonyításnál* (Possibilities of the co-operation of the professional psychologist in the taking of evidence in criminal procedure) Pszichológiai tanulmányok XI. Budapest, 1968. p. 597.

[11] PETERS, K.: *Strafprozeß.* Textbook, Karlsruhe, 1952. p. 287.

[12] PANHUYSEN, U.: *Die Untersuchung des Zeugen auf seine Glaubwürdigkeit.* Berlin, 1964. p. 96.

[13] UNDEUTSCH, U.: *Die Entwicklung der gerichtspsychologischen Gutachtertätigkeit.* Göttingen, 1954. p. 10.

Varia

System of Legal Sanctions of Environmental Preservation*

The pollution of human environments, and the struggle against it, have become topics discussed the world over and matters of public concern. Owing to its interdisciplinary character this struggle extends over several branches of science. So far Hungarian legal literature has made a single contribution only to the discussion of this problem. In this paper the author recommends the institution of measures by the following classification: (a) Definition of the legally relevant notions of human environments, pollution and sources of pollution (air, water, soil); establishment of the possible forms of natural and artificial defence, and with the aid of these the formulation of the obligatory norms of operation and prevention; (b) amendment of the relevant legal institutions of earlier date to meet the new exigencies and the introduction of new institutions, if necessary (e.g. soil preservation); (c) creation of a differentiated and efficient system of sanctions; (d) creation of a complex system of provisions relating to environmental preservation, a policy purposing the creation of harmony among the new engineering methods, technical processes and the existing economic and social conditions.[1]

In this paper the discussion of the problem will be confined to considerations of the system of sanctions. Also an analysis of the relevant institutions of the Hungarian legal system will be attempted, and by a survey of Hungarian legal practice certain conclusions will be drawn as to the efficacy of the legal institutions in question.

Effective law dealing with environmental preservation, hereincluded its system of sanctions, cannot be squeezed into the framework of a single branch of law. As a matter of fact the technical, social and economic problems of human environments have repercussions on the most variegated fields of life, and so also on national economy. Thus in the given instance topically the case is one of a cross-section through the legal system as a whole. Since environmental preservation affects so to say all branches of the law, it must be considered an inter-disciplinary scope of law. In several branches of law efforts are made to provide guarantees for environmental preservation, yet none of these branches assert a claim to exclusiveness.

In the following in the first place, on consideration of their mechanism of effect, the types of sanctions applied in the field ef environmental preservation and their efficacy will be reviewed, on the understanding that the struggle against environmental pollution has as its principal goal the defence of mankind. Obviously this "mancentredness" will justifiably lead to the conclusion that the right to the purity of the natural environments, i.e. the purity which is the safeguard of the biological existence, the health, etc. of man, is in

* Based on the proceedings of the session of the scientific working team of the chair of agricultural law of the University of Agronomics of Gödöllő, Hungary, held on April 13, 1972.

[1] NAGY, L.: *A környezetvédelem jogi aspektusai* (The Legal Aspects of Environmental Preservation). Magyar Tudomány, 10/1971.

reality a fundamental civic right, which has been brought under regulation in the first place by the Constitution as the right to life, health and corporeal integrity, and, secondarily and in a concrete form, by the different codes of law.

The penalization of human conducts deemed as unfavourable for society can of course take place in a differentiated form only. The penalty has to be adjusted to the safeguarded interest and it has to be proportionate to the conduct prohibited by the law. Within the scope of this study the sanctions can therefore be defined adequately only as the outcome of a multilateral legal analysis.

I. System of the legal sanctions of environmental preservation

Owing to the interdisciplinary character of environmental preservation in principle several types of sanctions of legal liability have developed in this field. According to their principal types these may be administrative sanctions (penalties, prohibition of manufacture, suspension of manufacture), damages (as typical civil law consequence) and penal sanctions.

Of the types of sanctions of legal liability established in environmental preservation we shall discuss exclusively damage in detail. This of course does not imply the underestimation of penalties or the sanctions of criminal law. On the contrary, for their significance they may lay claim to special discussion. However, in the present instance the civil law consequences of environmental pollution can be dealt with only.

Still as regards penalties or fines we cannot dispense with mentioning that the ridiculously low upper limit of the penalties and fines is hardly apt to guarantee the efficacy of the sanction.

As regards criminal law, so far the legislator has except for the poisoning of wells hardly discovered conducts in environmental pollution which would deserve a penalty. In all likelihood before long here too the prosecution of certain noxious conduct will be indispensable.

II. Damages

1. In both Hungarian and European legal practice the thesis has become established to oblige enterprises, co-operatives, etc. responsible for the pollution of air or water to the payment of damages to the prejudiced party.

Unfortunately these suits for damages are of an extremely complicated nature and often it is difficult to prove guilty conduct. Both the assessment of the causes of damage and the exact reproduction of the process are almost impossible. As a matter of fact there is an extremely wide gap, even in the temporal order, between the sites of pollution (in particular in the event of water pollution) and the supervention of the damage.

The difficulties, both procedural and substantive, in producing evidence of the guilt of the party causing the damage throw out a number of questions awaiting solution.

As has already been made clear the provisions of law relating to environmental preservation have to rely on the integration of law and natural sciences to a very high degree. Consequently the judge proceeding in the case has to be well informed in the given scope of natural sciences. It would be pre-posterous and even impossible to demand from the judge thoroughly learned in the law to react as an expert to the relevant problems of natural sciences, which in general embrace the latest scientific results. Although the judge may consult experts, or even an expert advisory panel, for their opinion, but unfortunately as taught by practice often conflicting positions are taken by the learned experts of the specific branch on the very same question. Even in this case the judge has to deliver judgement, and for that matter a judgement for which certain special knowledge is essential.

2. The difficulty to produce conclusive

evidence of the guilt of the party charged with causing the damage raises the question of the ground on which the liability of the guilty party for damages relies.

As is known, in modern legal systems liability for damages has two established forms, viz. first, liability relying on the culpable conduct of the party causing the damage (§ 339 (1) of the Hungarian Civil Code), and, secondly, objective liability (§ 345 of the Hungarian Civil Code).[2]

Acts coming within the category of liability without culpability are functions of technical development. As a matter of fact technics may be responsible of novel types of damage. At the same time, however, at least in principle, technology produces the means of defence against damage. As for the present subject activities of chemical type, or of chemical origin, hereincluded all kinds of pollution imply the novel sources of risks, namely sources of risks which have undergone qualitative changes. Thus in principle the sphere of the application of objective liability has been extended. (As a matter of fact as for the outcome there is no difference between mechanical force and the effect of chemicals, at least on the theoretical plane.)

Naturally the sphere of the sources of risks presents a motley-coloured picture. The law for its part cannot even deal with all sources one by one. Consequently the areas have to be surveyed to which statutory regulation can be extended, or where it can possibly be widened. As for the present subject before all an exact legal definition of the term "poisoning" as associated with sewage (refuse and waste water) has to be given. As a matter of fact there is a certain ambiguity in judicial practice as regards this term when cases have to be determined forthcoming from two branches of agricultural exploitation of water resources, viz. pisciculture and irrigation.

The application of the formula of objective liability ot damage caused by processes of a chemical nature has received its confirmation by the practice of the Supreme Court according to which spraying and dusting with materials containing poisonous ingredients must be qualified as an activity implying risks of high degree irrespective of the mechanical power used for the process.[3]

Since owing to the changes the chemical composition undergoes in the pollution, it is extremely difficult, in the causal relation responsible for the damage to spot the element or elements which establish the culpability or the guiltlessness as the case may be of the agency causing the pollution, for the given cases recourse to the application of the by far more rigorous formula of objective liability appears to be an expedient of higher efficacy. In any event final conclusions can be drawn only on hand of generalization relying on the proper analysis of the cases. As a matter of fact it should be remembered that at the present state of technology damage cannot be prevented with equal success in each case. Nevertheless in each case both the quantitative and qualitative properties of the pollution have to be considered, in the first place with the objective that should the sanction of damages become objectively inapplicable recourse must be had to other types of legal sanctions, or non-legal (economic, financial, etc.) incentives or restrictions.

As has already been made clear, judicial practice qualifies spraying or dusting with poisonous materials unambigoously.

Judicial practice is uniform also in so far as at the establishment of the liability all circumstances have to be considered,

[2] There are other legal systems which recognize the category of objective liability. So e.g. Swiss law; moreover in cases of damage or loss owing to the pollution of water the Swiss legal system has recourse to objective liability. Although it does not use the term, still essentially it lays stress on objective liability, when it harbours doubts as to the possibility of producing evidence of liability for tort by declaring that owing to the complex fact of noxious pollution of water willfulness is almost out of the question.

[3] In his judgement No. Pf. II. 20.243/65 the Hungarian Supreme Court qualified the use of chemicals (poison) having a destructive effect on bees an activity fraught with risks of high degree.

so the character of the source of energy used for the activity, the risks involved in the materials or tools used, the frequency of the causation of damage associated with the process, the controllable or uncontrollable character of the damage-causing effect of the activity, the methods of performance of the activity in question, etc. In general the statement may be made that if the activity in question, on these considerations and by other criteria, permits recourse to objective liability, the activity has to be qualified as one implying risks of a high degree. It is meaningless whether for the prevention of loss to persons or materials the statutes specify a number of special obligations. For the establishment of civil law liability these obligations are irrelevant and they have a significance only at the distribution of the damage.

Likewise the establishment of the liability for damages will not be influenced by the circumstance whether the damage resulting from activity involving risks of a high degree occurred in an area controlled by the person performing the activity, or outside it.

In general the positions taken by the colleges of judges of the Supreme Court determine liability for the storage and use of poisonous materials by §. 345 of the Civil Code. Nevertheless opinions are divided on the question of the storage of small quantities of poisonous materials, or of their occasional use.

According to the majority position it is not the small quantity of poisonous materials, or their occasional use, which is decisive, but the character of the activity. This is what establishes the application of § 345 of the Civil Code, the more because it is the objective hazard which has to be borne in mind by all. There may be difficulties in establishing the quantity of the poisonous material exactly constituting a risk, or when an act may be considered being occasional, or one implying a permanent risk, as for the party suffering the loss moderate poisoning might be as dangerous as one caused by a large quantity of poisonous matter, i.e. the use of a small quantity of poison may be as hazardous as large quantities. (The use and storage of poisonous materials not exceeding the usual limits of private homes and housekeeping cannot be qualified as implying risks of a high degree.)

Another question is whether the substance has to be poisonous in general, or only for man. In general it is held that the dangerous character of the poisonous substance cannot be narrowed down to man: the risk of financial or material interest too establishes objective liability.

If damage caused with poisonous substances is due to activities displayed under contractual relations between the parties, liability is defined by the terms of the contract. In the event of a *locatio conductio operis* the entrepreneur is liable even when the party passing the order has supplied the poisonous substance. In the event of a contract of agency the provisions of § 350 of the Civil Code relating to the liability for damage caused by the agent to third persons hold. The person pursueing activities implying hazards of a high degree have to answer for damage by virtue of § 345 of the Civil Code even in the event of contractual relations.[4]

Most of the disputes, and also conflicting opinions, arose from the question of qualifying the liability for damage caused by waste waters containing poisonous substances, or other substances (flue gases, smoke etc.) escaping from manufacturing processes. According to the majority opinion of the conference of the preseding judges of the Civil College of the Supreme Court of Hungary in such cases, and also when though the substance escaping from the manufacturing process is not impregnated with poisonous matter, yet causation of damage is regular or of a mass character,

[4] According to judgement L. B. Pf. I. 20 983(1972)2 the contractor is bound to restore damage caused by dropping poisonous chemicals from aircraft who has undertaken spraying under a contract with the customer and has actually carried out the order. In this case the customer cannot be considered master in respect of the party suffering the damage, as the source of risk was not even temporarily at his disposal.

the rules of liability as laid down in § 345 of the Civil Code have to be applied. Else liability conforms to the general rules of the reparation of damage (§ 339 of the Civil Code).

At the same time forensic practice has developed the other way round, when in the cases in question almost unanimously recourse is had to § 339 of the Civil Code. In general the courts of law held that in the given instances for the purpose of the application of the rules of liability for damages there was a case of positive, active conduct responsible for loss, and as such, for want of a statutory provision recognizing its exceptional character, unlawful. Hence a plea of the want of unlawfulness would in the given case amount to a defence failing to produce the wanted results, although there is no doubt that from the plant, if properly operated, as a permanent process, a considerable quantity of pulverized or gaseous substances will escape into the atmosphere which as facts and results have both to be appraised as active conduct. The courts further held that for successful defence a provision of law would be needed which precluded the unlawfulness of the conduct responsible for the damage.

It appears to be worth-while to subject the reasons given by the judiciary in their decisions to a thorough scrutiny. Accordingly the person responsible for the damage caused by pollution, i.e. the defendant in the suit, cannot in the given cases escape liability for damages, inasmuch as there exists undoubted causal relation between the supervening loss and the unlawful and guilty causation of damage establishing the civil law liability for damages.

The question may be asked whether the act of the defendant causing pollution is in fact unlawful. Statutory law declares the general prohibition of the causation of damage. This general prohibition may in the first place be derived from §§ 2 and 4 of the Civil Code. According to § 2 (1) "This Act protects the rights . . . of the citizens and their organizations (pertaining) to property . . ." The violation of these rights to property is according to the provision of the Act unlawful. I.e. when the defendant responsible for the pollution causes loss to the plaintiff with his act, he proceeds in an unlawful manner. Thus in general any causation of loss or damage will become unlawful unless the law makes exceptions. Such a circumstance precluding unlawfulness in accordance with statute is e.g. is proper operation or use.

In conformity with § 2 (2) of the Civil Code "This Act assures both to the citizens and to their organizations the free exercise of the rights pertaining to them, in accordance with the social function of such rights." According to § 4 (2) "In civil law relations everybody shall act by mutual co-operation and in accordance with the demands of socialist co-existence. Co-operation shall be realized by strictly performing all obligations and by exercising all rights in conformity with the function of such rights."

By itself the operation of a plant causing pollution is lawful, the case being one of the productive activity of the plant. All that has to be ascertained is whether the exercise of rights associated with the causation of damage or loss has taken place lawfully, i.e. in connexion with the proper use of the plant. If lawful use can be established, the act has not to be considered unlawful, and so in point of principle the case will become one of permissible causation of loss or damage. Here, however, the question of bearing the loss or damage will arise: whether the loss or damage should be borne by the person suffering it, or by the person "lawfully" causing it (the question of liability for damages), or by the totality of national economy (by way of economic, financial, or price political measures).

In the event of the exercise of rights contrary to their purpose, although the formulation of the Civil Code is fairly vague here, it can hardly be doubted that the abuse of rights amounts to an exercise of rights incompatible with the social pur-

pose of such rights. In particular acts causing loss or damage to national economy come within this province. The relevant provisions of § 5 of the Civil Code are of a declaratory character only, the consequences, or sanctions tied to the infringement of the rules of co-existence being dealt with by contract law. In the given instance, for the exercise of rights contrary to their purpose, an act qualifying as an abuse of rights, the provisions of § 339 of the Civil Code will hold, i.e. for loss caused by pollution the person causing it is liable for damages.

However, on the ground of what has been set forth before if loss or damage has been caused by pollution, liability for damages by § 339 of the Civil Code cannot be established in each case in the clear-cut form as presumed by the courts of law in their present practice of the administration of justice. In any event the clarification of the notion of the exercise of rights according to their purpose or function calls for a detailed analysis. There remains the question of the hazard and of bearing the loss in the event the exercise of rights according to their purpose has been established. In this case there is no unlawful causation of loss or damage, so that the provisions of § 339 of the Civil Code cannot be invoked. The idea suggests itself of the expediency of introducing a substantive rule of law decreeing the absolute obligation of the installation of properly operating filtering or protective equipment. If this is done there would be not need for the establishment of the presence or absence of unlawfulness before the application of § 339 of the Civil Code, a measure owing to the formulation of a generalized character of the Civil Code often fraught with difficulties. Instead the culpable liability of the person responsible for the loss, or the want of it, could be established by invoking a concrete substantive provision of law. This expedient would solve a number of difficulties cropping up at the establishment of culpability. There is a number of substantive provisions of this kind, still their practical enforcement has failed to produce the desired effect.

In Hungarian literature on environmental preservation a position has been taken which qualifies legal relationships originating from pollution caused by the productive activities of manufacturing plants as extra-contractual relationships, i.e. such as establish a claim for compensation. This is a specific kind of liability for the outcome, when merely the supervening result is unlawful, whereas the conduct causing it, e.g. the productive activity of the manufacturing plant in question, is lawful. The author taking this attitude suggests the complex regulation of liability for the result. The regulation as suggested would imply the unlawfulness of the result only, but not that of the conduct.[5]

4. This brief survey of the system of sanctions as laid down in the Hungarian Civil Code may be concluded by the statement that the unlawfulness or culpability of the conduct is attached to the loss or damage to property, so that the sanction entailed by the conduct, i.e. damages, is applicable whenever there is loss or damage to property.

In connexion with conducts causing damage to human personality, a problem emerging in the sphere under discussion, the question may be asked whether civil law may content itself with qualifying conducts responsible for loss or damage to property as civil law torts, or whether it should take measures also against all conducts injurious to the personality.

Personality is the primary sphere of interest of man. Its manifold manifestations cannot even be grasped by the law in their totality.[6] Still the legislator has to bear in mind the historical process of the growth of law, a process which of necessity will lead to a comprehensive regulation also of rights attached to personality.

[5] Cf. TIMÁR, L.: Magyar Jog, 1/1971.

[6] TÖRŐ, K.: *A személyiség polgári jogi védelme* (Civil Law Safeguards of Personality). Magyar Jog, 11—12 1971.

The Hungarian Civil Code in a generalized form decrees the safeguard of any rights attached to personality. Since in addition to being a social as well as a legal notion personality is inseparable from its biological basis, the corporeal integrity of the individual carrying personality, the violation of which constitutes a private wrong to the person.[7] This is the point of contact, namely the safeguard of bodily integrity, which ties up the institution of environmental preservation with the safeguard of personality. As a matter of fact the approach must be waived which interprets the notion of assault narrowed down to manifestations of bodily harm observable outwardly.

In the following Hungarian civil law will be surveyed operating as the safeguard of the rights and interests of personality. Two methods of restitution may come into consideration for the violation of rights attached to personality, viz. (a) recourse to the specific means of restitution of prejudice to personality (means which in general are inadequate for the effectual remedy of the prejudice); and (b) damages. Damages are the most effectual institution of civil law protection.[8] There remains the question, however, to which extent the rules of financial liability may be enforced for the safeguard of personality. In the foregoing discussion reference has already been made to the property-centred approach of the Hungarian Civil Code. Accordingly the construction of financial liability is attached to the actual loss or damage to property. However, in the given instance there is a case of prejudice not expressible in terms of money to the immaterial (moral, personality, mental, spiritual) rights of man, although loss or damage may occur also to property. Since immaterial goods cannot be expressed in terms of money, in the strict sense of the notion here restitution is out of question. What may come into consideration is the institution of ideal damages (financial restitution). The Hungarian legal system, however, has doubts as to the applicability of ideal (financial) damages in the event of the violation of interests attached to the personality.

While in Western European and in certain social legal systems a wide scope has been given to the restitution of immaterial ideal, non-tangible, loss or damage in terms of money, the majority of the scholars of the Hungarian legal system takes a stand against the expression of damage to immaterial, intangible assets in terms of money.

On the other hand there are scholars who believe that even in socialist legal systems there is need for the recognition of the institution of ideal damages. In their opinion this institution of law ought to be freed from its rigid, capitalist construction, where only the business or financial aspect of the problem is of interest, whereas the injury to personality itself is thrust to the background and is appraised exclusively as a financial prejudice.[9]

It is the function of the socialist legal order to safeguard the moral values of man, his personality, in all its manifestations. The "recompense" in terms of money meant to remedy the non-financial prejudice primarily is void of the character of a financial compensation, and serves merely as an approximate counter-balance of the injury suffered, as the expression of some sort of solidarity of society with the injured party.[10]

We agree with the doctrine that no sharp line can be drawn between the financial interest and the ideal intangible interest, although this is what the Hungarian system of damages exactly does by segregating human work from the integrity of the human organism, notwithstanding the fact that the integrity of the human organism is the precondition of the performance of human work.[11]

In any case a revision of the system of sanctions of injury to personality appears

[7] TÖRŐ: op. cit.
[8] Cf. TÖRŐ: op. cit.
[9] Cf. TÖRŐ: op. cit.
[10] Cf. TÖRŐ: op. cit.
[11] For details see TÖRŐ: op. cit.

to be indispensable, mainly with regard to damages. The compensation of immaterial values in terms of money may have far-reaching repercussions on the whole province of environmental preservation. As a matter of fact if the noxious effect of a polluted environment on the hygiene of man is conceived as injury to personality, the institution of damages may by its preventive, retroactive effect have an important rôle in the struggle for pure, natural environment.

Mme M. Bogyay

Une conférence internationale de l'histoire du droit pénal

(Cracovie, 16—18 octobre 1973)

En 1959 les historiens hongrois et slovaques de l'histoire du droit ont commencé un nouveau mode de collaboration: de traiter les problèmes communs dans le cadre de certaines séances de discussion. C'est aux professeurs *Andor Csizmadia* de Pécs et *Leonard Bianchi* de Bratislava que revient le mérite de l'initiative. Depuis leur initiative l'on avait tenu presque tous les ans une séance de discusson tantôt en Hongrie, tantôt en Slovaquie. C'est pour la première fois qu'un tiers État socialiste s'est chargé de l'organisation de la conférence. L'initiative se développe d'une manière excellente. Dans la conférence de Cracovie l'on avait déjà distribué les premières invitations à la prochaine conférence qui aura lieu entre 12—14 septembre 1974 en Roumanie, à Mamaia près de Constanţa, organisée par l'Associations des Scientifiques de Roumanie, sur les éléments culturels et sociaux de la législation primitive.

En effet, les conférences se joignent déjà depuis une dizaine d'années aux thèmes déterminés. Ainsi en 1966, à la conférence de Smolenice (en Slovaquie) on avait choisi comme thème la formation des juristes avant 1848, en 1967 à celle de Budapest le développement du droit civil de l'ère bourgoise, en 1972 à celle de Siklós la formation de l'administration de l'État bourgeois.

Déjà de bonne heure ont participé aux conférences les historiens de droit des autres États de l'Europe centrale. En 1966 à Smolenice ont déjà pris part les Autrichiens, les rechercheurs d'histoire du droit des deux États allemands et de la Yougoslavie. Dès la conférence de 1967 de Budapest nous avons rencontré des Français aussi. Les historiens de droit soviétiques ont participé à la conférence de Smolenice en 1971 et à celle de Siklós en 1972.

A la conférence actuelle ont été présents plus de soixante délégués. Bien entendu, ce sont les Polonais qui ont participé dans le plus grand nombre (25 délégués), et la plupart d'eux étaient de la ville, de la part du corps didactique de l'Université Yagello de Cracovie. Six d'entre eux avaient présenté des rapports. En dehors d'eux nous quatorze Hongrois, nous étions les plus nombreux, avec dix rapports. Les Roumains étaient six, mais ils sont exposé également les rapports de trois collaborateurs absents. Les historiens slovaques et ceux de la République Démocratique Allemande et de la République Fédérale d'Allemagne étaient trois-trois, mais de la part de la RFA et de l'Université de Bratislava chacun n'avait présenté qu'un seul rapport. L'Autriche a été représentée par six membres, mais seulement avec deux rapports. Enfin de la France, de la Bulgarie et de Prague est venu un rechercheur, mais chacun d'eux avait présenté un rapport.

C'est l'histoire du droit pénal qu'on avait choisie comme thème de la conférence de Cracovie. Au fond, le choix du

thème est juste, parce que dans le cadre de ces conférences une discussion systématique du droit pénal n'a pas encore eu lieu, quoiqu'ils soient beaucoup de traits communs dans le passé de l'histoire du droit pénal, comme c'est ressorti à la conférence aussi. (L'on doit mentionner ici l'exposé de *M. Lazarescu* esquissant les traits spécifiques roumains de la félonie.) Dans nombre de cas, aux conditions identiques du développement économique et culturel, on rencontre des différences, mais aussi plusieurs interactions entre le développement de l'histoire du droit pénal des nations. Décidément, c'est bien dommage qu'on ait tracé d'une manière générale le cadre de la conférence et qu'on n'ait pas concentré la discussion sur une certaine époque du développement du droit pénal. En effet, on avait présenté à la conférence 4 exposés concernant le droit romain (dont trois sur le développement du droit romain dans l'ère féodale), 10 rapports traitant des problèmes appartenant d'une manière classique au domain féodal de l'histoire du droit pénal, 7 co-rapports se sont occupés des mouvements et des expériences lesquels avaient préparé le droit pénal bourgeois en vigueur dans le milieu étatique féodal, 10 co-rapports se sont occupés du droit pénal de l'ère bourgeoise et trois des problèmes correctionnels de l'ère contemporaine. C'est l'extension des rapports sur un terrain aussi large qui avait rendu difficile les discussions au fond.

Les discussions ont été rendues difficiles davantage par le fait que l'organisateur de la conférence n'a pas essayé de grouper les rapports suivant leurs sujets, en présentant dans la même séance les rapports concernant le droit romain et grouper en deux séances les thèmes féodaux etc. (Une telle division se pourrait faire suivant les sujets.) Ce sont des considérations protocolaires qui ont probablement empêché l'organisateur de la conférence, car parmi quatre thèmes de droit romain trois avaient été exposés par des rapporteurs polonais, et de cette façon des 6 rapports polonais trois auraient été présentés dans la première séance. C'est ce que le style hospitalier ne pourrait permettre non plus. On avait soin également à ce que les nations avec beaucoup de rapports soient dans la mesure du possible divisées, et qu'on présente des rapports roumains et hongrois à chaque séance. Mais cela n'a pas réussi parfaitement, car dans deux séances quatre rapports hongrois ont été présentés et dans trois séances deux-deux rapports roumains. Protocolairement une bonne impression a été produite par le fait que presque à chaque séance parmi les rapporteurs se trouvaient les fils de quatre nations différentes, mais il y avait aussi des séances où se trouvaient six fils de nations différentes.

Mais cela a tellement mêlé le groupement des sujets qu'il y avait plusieurs séances aussi où se sont présentés de thèmes de droit romain, de droits féodaux, des systèmes juridiques introducteurs du régime bourgeois, de l'ère bourgeoise, les uns après les autres, et naturellement, la discussion a été ouverte après chacun des rapports.

C'est précisément parce qu'on avait ouvert un cadre de thèmes très large aux rapports, que les exposés étaient très nombreux. A chaque séance il y avait au moins cinq, mais il se trouvait des séances avec 7 exposés aussi. Ce fait a produit la limitation du cadre de temps à une durée très courte, à 10 minutes. Cela fait honneur aux rapporteurs qu'ils ont soigneusement respecté ces 10 minutes et se sont efforcés de concentrer le fond de leurs rapports plus longs dans les dix minutes, en présentant tout de même un rapport parfait. Cela avait produit cependant cette conséquence douloureuse que la majorité des rapporteurs n'a pas pu exposer ses arguments et leur rapport est devenu quelquefois de nature récapitulative et semblable à une thèse. On a pu remarquer cela par exemple dans l'exposé de M. *Maly Karel,* professeur à l'Université de Prague, sur le crime et la peine dans la société féodale tchèque des XV^e^ et XVI^e^

siècles. Néanmoins, il se trouva des exemples du contraire aussi; il était frappant par exemple le rapport de M. *Werner Ogris*, professeur viennois, sur le rôle des monarques de l'absolutisme féodal dans la jurisdiction pénale.

Il est vrai, que les participants à la conférence ont reçu le texte complet des rapports, mais seulement au moment de leur arrivée à Cracovie, et dans la plupart des cas même le minimum de temps physique n'est pas resté à notre disposition pour étudier les rapports de base, souvent très vastes. Moi non plus, je ne pouvais parcourir qu'au plus trois ou quatre rapports avant la séance de leur présentation.

Néanmoins, à l'exception d'une seule séance, à chacune ont eu lieu des discussions, sur quelques rapports même trois ou quatre participants ont pris la parole et le rapporteur a répondu à chacun. Mais ces discussions se sont remuées un peu sur la surface et se portaient sur des questions qui avaient saisi les auditeurs lors de l'exposé des rapports courts et de nature récapitulative, de sorte qu'ils pouvaient compléter les rapports ou signaler quelques différences existantes dans leur patrie, et mettre quelquefois sous point d'interrogation les résultats du rapporteur.

C'était une idée d'organisation bien habile et utile présentée par le professeur *Leslaw Pauli* d'intercaler entre les séances des pauses de midi plus longues, quand tantôt organisés, tantôt un par un, nous avons visité le cartier central et le château magnifique, et quand nous avons obtenu quelques impressions de la vie là-bas. Alors, chaque jour à huit heures du soir nous nous sommes assemblés entre les murs d'une sobriété puritaine de l'Institut d'Histoire du Droit de l'Université, et là nous avons eu une conversation parfaitement libre. Lors de ces entrevues du soir nous avons discouru presque totalement sans cérémonie beaucoup de choses, et nous nous sommes entretenus de la thèmatique de la conférence de Constanța qui aura lieu l'année prochaine, et à maintes reprises nous avons continué la discussion des thèmes des séances du matin dans un cercle plus restreint.

Par -ci, par-là il se trouva des résultats surprenants aussi. Il faut faire mention de l'exposé de Mme *Krystina Bukowska-Górgoni*, dans lequel elle avait démontré que le principe de « nullum crimen sine lege » était utilisé dans ses ouvrages théoriques par *Baldus* (XIV^{e} siècle) aussi, et quelques éléments de ce principe étaient parus également chez les glossateurs. Bien entendu, elle nous doit encore la réponse à la question de savoir pourquoi — si ce principe était déjà élaboré d'une manière théorique — l'on n'avait pas essayé de l'appliquer jusqu'à *Joseph II* dans la pratique aussi. Mais, ceci aurait été dans une contradiction importante avec l'exigence du féodalisme et de l'absolutisme en voie de formation, qui s'abstenait même de définir les crimes et se défiait mieux encore d'énumérer taxativement les infractions, parce que l'incertitude conférait un pouvoir plus grand au juge.

A l'étude de Mme *Bukowska* se relie presque directement l'exposé de *M. Lajos Hajdú* ayant pour objet l'introduction du Code pénal de *Joseph II* en Hongrie. Il en résulte que la Chancellerie Hongroise et la Curie Royale, c'est-à-dire les offices du monarque étaient également anxieux en ce qui concerne la mise en vigueur de cette loi en Hongrie, et l'on rencontrait des observations sur l'application pratique de la loi aussi. Ainsi donc l'application d'un Code pénal plus moderne n'était pas facile dans les conditions du féodalisme non plus.

Il ne peut pas être notre tâche d'analyser toutes les études, pas même celle des délégués hongrois, néanmoins les rapports des MM. *Andor Csizmadia, Kálmán Kovács, Ferenc Pecze, János Szita, Gábor Balázs, Gábor Máthé, József Buzás, István Kállay* et du soussigné ont éclairci de nombreuses questions de détail intéressantes et quelques études avaient engagé des discussions plus vives aussi.

Les quelques traits ci-dessus ont plutôt le but de motiver l'affirmation que lors de l'anniversaire de *Copernic* les historiens convoqués par l'Université Yagello de Cracovie ont fait un travail de fond, en renforcant les bonnes expériences ayant trait d'ores et déjà traditionnellement à la collaboration et à l'échange libre des opinions.

A. DEGRÉ

The Function of Law and Codification*

This paper is not concerned with the function of law *in general* or to study how the law by giving expression to the interests of a definite class or classes of society discharges its political and normative function. As is known, in Marxist theory the law appears as a phenomenon depending on other social, in the first place economic and political conditions. This dependence, however, far from being unidirectional or complete one, implies determinedness *in the last resort* only, and so it does by far not preclude the *relative* emancipation of law as an element of the superstructure from the economic basis or other superstructural elements, and its repercussions on these exactly owing to its relative autonomy. In the overall process of social evolution the evolution of law, with the effect of advancing the former or hampering it, is directed to promote the preservation of established or enforced social relations on the one hand, and the creation of social relations earlier unknown or not sufficiently general and their acceptation by force, on the other. Here in the function of law, in the service of preservation and change what concerns us is an instrumental element, namely what role codification has undertaken, or may do so, in the realization of that function by defining the patterns of preferable, permissible or prohibited conducts in a *comprehensive, systematic* form.

* Presented at the World Congress of the International Association for Philosophy of Law and Social Philosophy, Madrid, 7—12 September, 1973.

1. *Dialectics of the social change and preservation in the historical development of codification*

The delimination of codification as a possible technique of law-making will by itself reveal but little. As a matter of fact historically codification is not a wholly homogeneous phenomenon: its physiognomy is influenced by the evolution of its ideologies, by the modification of its functions to an extent that retrospectively we have to speak of formation of more or less autonomous types of it.

The historical types of codification manifest themselves as dependent on the components of social and legal evolution, embedded in the interrelations of them. In the definition of these types, however, exactly owing to their adhesion to the function of law, an extremely decisive role has been played by the *concrete* prevalence of the dialectics of change and preservation, by the extent to which the type in question has undertaken the conservation and development of the relations characteristic of the given social formation. As a matter of fact change and preservation accompany codification throughout its life as a dialectic unity. In the relative equilibrium of this unity, however, the stress on the change or the preservation, their ratio, parallelism, or the mutual transformation of one into the other constitute the characteristic, determining sign of the particular types.

If now the codificational pre-forms of

antiquity are surveyed, it appears that the *birth* of codification were somewhat clung to the change of law. In the exclusiveness of customary law organically combining with social life and its slow evolution, written law, i.e. the externalization and objectivization of the law made their appearance at a time when the metamorphosis of the earlier communities into widespread empires giving rise to accelerated development and social differentiation demanded law-reforms of *imperial* dimensions, to be enforced *immediately* and *uniformly*. The codificational products of more than seven centuries extending from the "reforms" of Urukagina to the Code of Hammurabi, with their prologues, intentional want of completeness and as appears from other knowledge we have, bear testimony to their birth from the demand for reforms and from the need for a conscious, planned and controlled change of society and law. These reforms and changes served the creation of a separate order, however, they did *not* have the relief of customary law as their goal. At least primarily their purpose was not the comprehensive establishment of the law, and so the function of preservation was in all appearance a merely subordinate one.

Whereas at the cradle of these early codificational products there stood *material* complaints referred to the actual conditions, it was characteristic of the following codifications of Antiquity the laments were more of a *jurisdictional* nature, — forthcoming from the confused, uncertain or rather anarchic state of the sources of law of the time. Thus in the development of the pre-forms of Antiquity codification extending from the collections of the Hittites, through the early Chinese codes and the Law of XII Tables (as told by Livy) to the codification of Justinian almost exclusively the function of *preservation* with special stress on it comes to the fore. The intention to supersede customary law and other non-written forms of law, to eliminate them and to transform the system of the sources of law manifests itself here. Incidentally as a means of social change, in particular in Rome, it is *not* codification that acts a part; codification has as its end preservation and comprehensive establishment of the law, and only by way of exception, and in conjunction with them, its inevitable actualization. The work of Justinian, as is known, succeeded neither in preserving earlier conditions presenting a higher degree of development, nor in superseding the earlier system of the sources of law. Thus the Code of Justinian served as a *tabula rasa*, which became the foundation of a new judiciary and customary development of law.

What the *Middle Ages* inherited was the idea of a comprehensive law-establishing code. In this manner the mediaeval and early modern precursors of codification present a striking similarity to the preforms of late Antiquity. It appears as if they had in reality laid the foundations of an in its intentionally absolutistic form unquestionably distorted statement namely that "à côté de la forme et du contenu qui lui sont propres, le code est caractérisé par divers attributs, qui ont tous en commun qu'ils contribuent à permettre une meilleure connaissance du droit."[1] These were law-*books*, statute-*books* in the strict sense of the term they had as their end the change of neither society nor the law. In the majority of the cases they did not even purport such changes. Strictly speaking their function was merely preservation of law and social conditions as transmitted by the comprehensive establishment of law.

The first examples of the *classical* type of codes were some German attempts at codification. In these codes, unlike the precursors referred to earlier, instead of the quantitative comprehension of the sources of law the *qualitative* grasp of definite branches of the law came clearly to the

[1] VANDERLINDEN, J.: *Le concept de code en Europe occidentale du XIII^e au XIX^e siècle*, Bruxelles, 1967. p. 163.

fore. The classical age of codification was at the same time the age of bourgeois revolutions whose most typical manifestation was the *Code civil* of the French Revolution. Breaking away from the casuistic system-creating attempts of the previous forms the *Code civil* served as an example not only for the creation of a more abstract *system*, but before all for the use of codification as a means of social change. From the *Code civil* to the Swiss codification and even beyond there is the process of intertwining the demands for social and legal *reform* with their modern codificational solution. Advance or challenge of social change by way of codification manifested itself in an even more drastic form in their South-American and Afro-Asian receptions. A further characteristic of this type is given by the fact that its trend towards reform, transmitted by the rigidity of an exegetic spirit, soon swings into the exclusiveness of *preservation*. This change of function before long will necessarily turn up as the *barrier* of further progress: as is known, the exigencies of monopol-capitalist development have primarily found expression in judicial practice, *opposed* to the codes. And the code more and more becomes the memory of bygone times. It survives as a skeleton, as a fossil kept alive. And re-codification, before it takes place, becomes obsolete: somehow it has lost its timeliness.

Socialist societies have revived recourse to codification as means of consolidating far-reaching social and legal changes under the conditions of the socialist revolution. All this has presupposed the use of earlier experience. Still socialist codification constitutes a qualitatively self-dependent autonomous type. Among the sources of its new quality there is one which at present calls for a study. Namely, socialist codification does not end with a fundamental change of society and law: it strives for the *maintenance* of its reforming character and of its living, unbroken association; at least periodically actualized, with the processes of social change. This codification does not merely purpose the maintenance of a relatively stable framework, but by undertaking and willing re-codification to become the conscious and controlled means of planning the future, resorted to as fundamental and established.

2. *The problem of codification as a basic legislative means of social change*

As regards the translation into reality of the dialectics of social change and preservation, the types preceding socialist codification may, for their historical existence, be considered such as have given evidence of the performance of their functions under given conditions. On the other hand, apart from certain sporadic experiences, the reality of Anglo-American codificational conceptions is still an open question. For more then two centuries all *Anglo-American* efforts tending to the comprehensive re-formation of the system of sources of law are essentially on the level of the *pre*-forms of Continental codification. As an open question of today the endeavours of the *developing* states manifest themselves to codify their law. Codification in these countries have as its ideal classical Continental type, or type of reception, or Anglo-American or socialist type, or combination of these ones.

The socialist type of codification is to some extent a transitory one. As a matter of fact experiences dating back to several decades are already at disposal, still development of the systems of socialism cannot by far be considered fully completed. In general socialist codification has completed the radical transformation of the legal system, in a way also affecting the system of sources of this law. What may therefore turn up as a problem is whether codification may be resorted to as a standardized, *established* means of planning the future development.

The limits of codification partially coincide with those of the law. Therefore the changes of codification in the overall process of social evolution in general do *not* imply a specific problem for codification. On the other hand in a manner characteristic of codification the problem of the *maintenance of association* with social change may turn up. As a matter of fact codes are written legal instruments which offer the regulation of a definite *quality* of a considerable (coherent) *quantity* of relations brought under regulation. I.e. already pursuant to this quantitative factor, social evolution affects the products of codification, their adequacy with greater frequency and intensity. Special stress will be laid on this by the qualitative determinedness of codes, by the specificity of their *system-creating character*, which operates towards the increase of their *power of resistance* to changes of any kind. As is known from the practice of centuries, comprehensive or partial amendments of the codes call for the suppression of considerable internal resistance: they necessitate rather circumspect preparatory work and the acceptance of a great number of risks. Hence the code with its established form in any case stands for *discontinuity* in the continuous development of society. This contradiction will, if it looms up, be first mostly lifted by judicial practice. On the other hand when social evolution enforces the adaptation of the code in this manner, when legal practice discharges such an occasionally unlawful, yet *de facto* sanctioned corrective function, it may happen that notwithstanding its original reformatory trends re-codification will *not* bring about, perhaps not even advocate, social change. Moreover its function in legal change might become limited to the mere *legitimatization* of the results of law-making by judicial practice.

Such a practice of codification and its renewal already owing to its conflict with rule of law considerations, cannot be preferable for socialist codification. In general in order that in the process of social evolution law might serve as the means of change, yet at the same time not become unreal, conditions have to be brought about for a continuous interaction between law and its determinants within a permanent process of *feedback*.

As is known, the first attempts of socialist legislation were permeated by revolutionary *illusions*. Bukharin and the law reviewer of the Hungarian Republic of Councils of 1919 almost simultaneously gave expression of their belief that codification of the fundamentals of revolutionary law would produce a *general* source of law which would throw out *no* problems of legislation anymore.[2] The Hungarian version of this tendency was formulated in the following manner: "the order of production of Communist society will be a planned one, simple and natural and the legal order suiting it will be clear and transparent like crystals. There will be *no* need for *voluminous codes* of the kind of the Talmud, *only* for basic principles clearly formulated and understandable by all, whose consequences for particular details may be drawn by anybody both at the management of his own affairs and at the settlement of the causes of other proletarians." This expectation was, however, confuted by life. Still it would appear as if the generalization of the content of code *increased* its useful life in the same way as the "reinterpretation" of its superannuated institutions might operate towards the maintenance of its validity. And although cases of this kind may occur, still it would amount to *self-deception* to believe as if in this manner codification had become a factor of social change, as if it had accepted a creative part in putting forth one phenomenon or another one. To assume this would be as preposterous as to consider the present

[2] BUKHARIN, N.—PREOBRAZHENSKY, E.: *The ABC of Communism* (Azbuka kommunizma. Peterburg, 1920), ed. by E. H. Carr, Harmondsworth, 1969. § 72; FÖLDES, I.: *Laikus bíráskodás és anyagi jogszabályok* (Lay jurisdiction and provisions of substantive law). Proletárjog, 7/1919. p. 50.

day revival of centuries old English precedents the reaping of the fruits of a provident "social engineering" of yore in the present age.

Socialist legal order, after completing the task of its foundation and elaboration, has anyhow reached a point in the development of its codification where what may be termed the *second* phase of codification begins.[3] The reformation of codes bear testimony to the fact that socialist codification in a truly unsophisticated manner wants to remain the factor of social *change*, and not only one of preservation. Therefore it is before all important that within the sphere of particular, circumscribed by the general and the individual, we discover the *optimum* level of regulation where it will an appropriate depth even from the point of view of the application of law, be able to anticipate the social relations to be shaped; i.e. to grasp the *typical* in a way not detached from the present still as an element of planning presuming the future; to anticipate a development which during the lifetime of the code might *simultaneously* figure as the factor of change and preservation. Furthermore it is indispensable that theory and practice of socialist law unambiguously make it clear that the act of codification, be it ever so fundamental, is but a *single* act in the evolution of law: birth and decay of the codes are *equally* necessary processes. Thus when the legislator is lagging behind with the adaptation of his code of the new needs of development, correction will of necessity break a way for itself through judicial practice. Therefore it may be argued whether the standpoint which in the otherwise rather sporadic cases of judicial law-making wants to discover abuses only, and in the shadow of these considers the critical element of a socially sometimes well-defined necessity negligible in its totality, is theoretically properly founded. Finally in view of this contingency it is essential that for its possible restriction socialist codification should not only undertake the advancement of social change and be willing to bring it about, but also accept as *natural* consequence the inevitable obsolescence and the need for repeated replacement by newer ways and means. As a matter of fact the need for planning will entail the further need for repeated re-planning: the reform will be premanent in codification only when it is conscious of the necessity of its own wear and tear, if it accepts the reform with its outlook of continuous self-reformation.

3. *Parallelism of changes in society and its codes: feedback in the socialist codification*

We have seen from what has been set forth that socialist codification cannot become a lasting factor of social change unless it effectively guarantees feedback, and that as its *basic* form we accept *re-codification* following upon codification. This is as a matter of fact the form which primarily guarantees the *renewed* recourses to codification as a means of conscious and controlled social planning *without* prejudice to the sphere of activity reserved for the legislator. Re-codification may manifest itself as codificational amendment, supplementation, or repeated new codification. The choice will be influenced partly by the rate of development of social conditions, partly by the demand for constancy operating against any kind of change of law.

Re-codification, with its frequency defined by the rate of social development, however, will in legal evolution bring about discontinuity and *abrupt* adaptation in all instances. This will be the case the more because when practical considerations are borne in mind, repeated re-codification *within* periods of a decade or two may hardly appear as expedient or possible. *Within* the basic form of feedback of codification — re-codification, within

[3] Cf. SZABÓ, I.: *A kodifikáció időszerű általános kérdései* (Current general problems of codification). Jogtudományi Közlöny, 10/1969. pp. 494–495.

the field circumscribed by their terminal points, such *further* forms of feedback will have to be developed as will guarantee the *continuity* of adaptaton whilst the discontinuity of the change of law. This continuity of adaptation, not prejudicial to the constitutional separation of law-making and law-applying activities and transmitted by the structural-systematic formation of the code is embodied by the judicial practice. Thus the grasp of typical in the sphere of particular will already in the province of level of regulation afford facilities to the legislator which will permit him to define the social relations in their *flux*, in the dialectics of their preserving by termination. And the way of presenting them in their dynamics affords the possibility of a *simultaneous* assistance of social change and preservation, which presupposes *creative* work on the part of the judge, yet does not of necessity assume an actual law-developing or law-modifying effect of this work.

This definition leaving elbow-room for regulation and its level is in this way calibrated to the *typical*. However, the codes reckon also with the unforeseen: with the subjective *atypic* arising in the wake of shortcomings of the formulation of law, and with the objective atypic forthcoming from new development. In the settlement of these problems socialist codification has opened a new path. Essentially this means that codifiers by formulating rules, principles or clauses of a *general* content which carrying direct social significance constitute the *comprehensive* policy-making framework of the regulation in question, offer an opportunity for those responsible for law-application to set aside an *otherwise* relevant provision and determine the case on the ground of *other* norms. By declaring the obligation of proper use of rights, or more precisely, by making these rights conditional on this principle (a principle which appears as the generalized reversal of the prohibition of the abuse of rights introduced by non-socialist Continental codes), socialist civil codes e.g. have relativized the legal consequences specified for the typical by a mobile evaluation gaining a concrete form in the process of law-application. By this the atypic here appearing, *strung* to the proper use of rights, will become the component of a *special* order: it will not anymore demand either for an artificial (but formally unlawful), or a socially unacceptable (though formally lawful) solution. In criminal codes the segregation of the atypic takes place in a way that the codifier combines the factual elements defined in the general and special parts of the code (and known also in classical Continental codes) of the existence of crime and/or the imposition of punishment, with the concrete danger the act constitutes to society. Since the codifier has by this drawn the limits of the typic, he has at the same time offered the judge the opportunity for a *creative* confrontation with social reality not presupposing necessarily law-developing or law-modifying effect: an opportunity for both correction and adaptation.

The systemic determinedness of the code, its division into general and special parts; the dialectics of its level of regulation mediating between the general and the individual on the level of particular; its structural elements, before all the preamble owing to its evaluating character providing a direct transition to the social content of regulation and offering guidance equally in the interpretation, gap-filling and continued development of law, and the general rules, principles or clauses providing normative basis for the segregation of atypic, — i.e. *all* components of the code-system taking part in the regulation jointly and severally help to close down codifying work *and* to keep it relatively open, to resist modifying interference *and* to encourage its development, or at least to channel them into a given riverbed. Hence as for its material the code is from the outset with itself identical only as far as the *trend* of its movement is concerned. It carries a structual content,

determinedness developing even in its fixedness, and unfolding in its closedness. In the service of the dialectics of social change and preservation demanding continuous feedback it is this determinedness which furthers to realize the reform of reform: a continuous and because embedded in the code-system, pre-planned adaptation and a re-codification starting *new* processes of change and preservation, built upon the foundations, framework structure and perhaps system of the earlier codification.

Cs. VARGA

Recherches sur l'histoire de l'administration publique*

I

La révolution scientifique-technique se déroulant à nos jours transforme d'une manière radicale les processus administratifs et les conditions du travail administratif sur tous les terrains de la société : elle a découvert de nouvelles possibilités, l'utilisation desquelles exige le réexamen des processus administratifs dans leur totalité. Sans exagérer, on peut affirmer que la révolution scientifique-technique avait apporté une révolution dans l'administration et au sein de celle-ci dans l'administration publique aussi. Ce changement nommé par beaucoup de monde « révolution administrative » produit non seulement la différenciation prononcée des organisations administratives et de l'activité administrative, mais transforme au point de vue de la qualité l'ensemble des processus administratifs, il réforme la structure et le fonctionnement de l'Administration dans sa totalité.

Les constatations précitées de l'exposé des motifs de la direction principale de recherche intitulé « *La fondation scientifique complexe du développement de l'administration publique* » constituant partie intégrante du plan national perspectif de la recherche scientifique, adopté par le Gouvernement, ont une importance déterminante dans l'avenir pour l'activité et le rôle des domaines des sciences intéressées.

Les objectifs partiels de recherche plus importants de la direction principale sont les suivants :

1° — La société, l'État et d'administration publique,

2° — L'organisme administratif public en tant que phénomène social,

3° — Le droit et l'administration publique,

4° — Le système d'information de l'administration publique,

5° — L'activité des organes administratifs publics,

6° — La mécanisation et l'automatisation de l'administration publique,

7° — Problèmes de la mesure et de l'effet de l'activité administrative publique,

8° — L'état personnel de l'administration publique eu égard spécial aux types des organes administratifs publics,

9° — L'effet de l'urbanisation sur l'administration publique,

10° — La direction centrale de l'administration publique,

11° — Les problèmes ayant trait à l'administration locale-territoriale,

12° — Les rapports de l'organisation territoriale, de l'économie et de l'administration territoriale eu égard spécial aux limites territoriales administratives publiques.

Dans les 12 thèmes en tenant compte également du nombre et de la dispersion des différentes institutions collaborantes, l'institution organisant les recherches fut

* Dans l'organisation du Conseil Coordonnateur a eu lieu le 11 février 1974, dans la salle du Conseil des Archives Nationales la discussion de l'étude de M. le professeur *Andor Csizmadia* intitulée : *Recherches d'histoire de l'administration publique.* Institut des Sciences Juridiques et Politiques de l'Académie des Sciences de Hongrie, Budapest, 1973. p. 68

l'*Institut ès Sciences Juridiques et Politiques de l'Académie des Sciences de Hongrie*, respectivement le *Conseil Coordonnateur*.

II

Sur la demande de l'Institut responsable du thème M. le professeur *Andor Csizmadia* avait élaboré une étude intitulée : Recherches sur l'histoire de l'administration publique (Constatation des faits et plan des thèmes).

Sur l'initiative du professeur *István Kovács*, membre associé de l'Académie des Sciences de Hongrie, président du Conseil Coordonnateur, a eu lieu dans les Archives Nationales la séance de discussion de l'étude de plans tenue sous la présidence du directeur en chef M. *Győző Ember*, membre de l'Académie, où ont participé en dehors des spécialistes en droit constitutionnel et en droit administratif des historiens du droit et des archivistes aussi.

Dans l'étude présentée par le professeur *Csizmadia*, laquelle avait ouvert la discussion, on peut distinguer deux éléments : l'établissement des principes renvoyant à l'importance des recherches relatives à l'histoire de l'administration publique avec un vaste résumé historiographique y rattaché, ensuite le plan de thèmes, les recommandations en tenant compte des conditions personnelles et matérielles nécessaires.

Les opposants désignés de l'étude de plans ont été M. le professeur *Kálmán Kovács* et M. *István Kállay*, chef de section aux Archives Nationales.

Des faits mentionnés dans les réflexions introductives il résulte de toute évidence que l'élaboration des directions principales de recherches ne se peut exécuter qu'avec la collaboration de plusieurs sciences affectées. La modalité de la solution des problèmes de ces objectifs majeurs a déjà été analysée d'une manière approfondie par la littérature spéciale. Parmi les ouvrages publiés nous mentionnons l'étude de M. *József Halász*, intitulée: *Les motivations et l'importance sociale du développement de l'administration publique*, publiée récemment dans la revue *État et Administration*. Cet ouvrage d'un niveau élevé consacre une attention particulière aux problèmes méthodologiques de l'administration publique comparée, ensuite dans les explications méthodologiques de l'auteur s'affirme vigoureusement l'exigence de l'historisme aussi. Quant aux modalités de la collaboration il relève « les comparaisons fondées d'une manière multilatérale, conséquemment plus efficaces supposent en même temps une bonne connaissance et l'utilisation des résultats des recherches dans les différentes disciplines et l'avancement de l'intégration des résultats ». Les historiens de droit et les archivistes sont d'accord, dans une large mesure, sur cette constatation. L'importance dans cette acception de la collaboration a été soulignée par les opposants, respectivement par tous les intervenants dans la discussion.

La vaste première partie de l'étude de plans doit être appréciée comme un résumé historiographique de niveau élevé esquissant les résultats scientifiques des derniers 100 ans — avait constaté M. le professeur *Kovács* dans son étude d'opposant. Il en est de même en ce qui concerne les appréciations qui s'occupent des relations internationales des historiens hongrois du droit, développées dans le domaine des recherches sur l'histoire de l'administration publique et des résultats de ces recherches réalisées jusqu'à présent. (C'est une chose connue que la présidence de l'organisation internationale des historiens du droit, de l'Association Internationale d'Histoire du Droit a pris l'initiative d'instituer un comité d'histoire de l'administration publique, en connexion avec l'Association.)

Le chapitre résumant les résultats réalisés jusqu'à présent par l'histoire de l'administration publique a servi de thème pour plusieurs observations critiques. Les intervenants se sont occupés en partie

des problèmes du groupement thématique, de la proportionnalité, respectivement de ceux des déficiences. Mais ils ont accentué que, nonobstant leurs complétements, ils sont d'accord sur la communication modérée des sources. *Zsolt Trócsányi* renvoya à la position centrale du juriste historien dans la littérature, en relevant, par exemple, le manque de l'intégration de l'activité des historiens d'entre les deux guerres, des historiens comme *Bálint Hóman*, *Imre Wellmann* etc., ainsi que l'énumération des sources publiées par les Archives Nationales suivant des groupements de spécialités etc.

Ensuite, l'intervention de *M. Iván Berténvi* attira l'attention sur les monographies traitant des thèmes du droit administratif publics, issues des ateliers des chaires d'enseignement d'histoire de la Faculté des lettres de l'Université Loránd Eötvös, respectivement sur les dissertations élaborées sous la direction des chaires d'enseignement.

Une bonne entente rencontra la mise en discussion par l'avis de l'opposant de M. *István Kállay* concernant l'appréciation approfondie de l'école de *Magyary*, laquelle avait exercé une influence remarquable non seulement sur son époque, mais sur les années d'après la Libération aussi.

Elek Karsay — en soulignant l'importance des recherches de *Magyary* — renvoya aux sources abondantes des documentations (commission interministérielle, principes fondamentaux de la simplification de l'administration publique) des Archives Nationales ayant trait à ce sujet. De même, M. *Imre Verebélyi*, qui avait sollicité la continuation de la mise à jour et la publication de l'héritage précieux de réforme de *Magyary* se trouvant dans la possession de la chaire d'enseignement de droit administratif public de la Faculté de droit de l'Université Loránd Eötvös.

La deuxième partie de l'étude s'est occupée de la délimitation des époques des recherches concernant l'histoire de l'administration publique, des recommandations de thèmes, respectivement à la suite de ceci de la nécessité de l'exécution des recherches. Monsieur le professeur Csizmadia donna dans l'introduction de la séance de discussion des informations sur ce que l'élaboration de sa proposition a été précédée par la sollicitation des avis de nature informative de la part des institutions dans le domaine spécial intéressé. Les objectifs obtenus des unités de recherche ont été utilisés dans la formation de la conception du travail.

A son avis, les recherches devraient être concentrées sur le dernier passé, respectivement sur les dernières décennies de l'ère capitaliste. Pour la concentration des recherches il indiqua la période d'entre les deux guerres mondiales, ensuite le développement de la Libération jusqu'au régime des Conseils. Pour toutes les deux périodes, comme première phase du travail il proposa de créer une base des sources.

Il redommanda d'élaborer — eu égard à la période du plan perspectif aussi — dix thèmes (les expériences des réformes administratives; l'aménagement territorial; la structure de l'Administration à l'échelon central et local; la réalisation des principes démocratiques dans ces organisations; l'administration générale, les organes administratifs spécialisés; le problème du service public; la juridiction dans les affaires administratifs publiques; la procédure et la technique administratives; les problèmes du contrôle). Cependant, il attira également l'attention au fait que la base de recherche actuelle dans le domaine de l'histoire du droit ne peut s'engager à l'élaboration de tous les thèmes énumérés, mais seulement à quelques-uns d'eux. Sur cette base — mais bien armé d'un optimisme vigoureux — il essaya de suggérer d'engager les quatre chaires d'histoire du droit constituant la Collectivité de travail d'histoire du droit au sein de l'Académie des Sciences de Hongrie.

III

Les observations du rapport traitant les limites de l'époque de recherche, comme aussi les recommandations des thèmes étaient — et c'est facile à comprendre — le point central de la séance de discussion. Les opposants d'une manière générale et les intervenants concernant quelques-unes des périodes en cause ont développé leur point de vue. Les opposants ont été d'accord sur ce que les périodes qui doivent être recherchées sont relevantes du point de vue du développement des dernières cent années eu égard spécial à l'histoire de l'administration publique des dernières périodes. Les opinions étaient également concordantes sur ce point que les problèmes de l'Administration moderne se sont déjà présentés du temps de l'absolutisme éclairé en Hongrie en précédant presque avec un siècle le compromis austro-hongrois. Les résultats des recherches récentes ayant trait à cette époque sont très importants dans les travaux traitant les époques postérieures aussi. A côté des opposants quelques intervenants ont également abordé ces enchaînements *(Zsolt Trócsányi, Iván Bertényi)*. On a encore exprimé l'opinion qu'en première ligne il faudrait considérer comme directives « les exigences de terme du thème ». En ce qui concerne la recherche d'histoire des institutions, M. *Imre Verebélyi* se déclara partisan du principe « peu de thèmes, spectre plein » et cela sur la base de la comparaison avec les pays voisins.

Parmi les recommandations de thèmes pour l'étude du plan le professeur *Kálmán Kovács*, eu égard à la contribution utile aux objectifs de la direction principale de recherche et pas en dernier lieu à l'effectif de la base de recherche actuelle, considéra comme justifié de relever 5 thèmes:

1° — Les expériences des réformes administratives entre les deux guerres mondiales, comme aussi de la Libération jusqu'à la réalisation du régime des Conseils,

2° — Les problémes de l'aménagement territorial et du régionalisme dans les époques mentionnées,

3° — A l'échelon central et l'édification de la structure de l'administration, ses fonctions et changements dans les périodes indiquées ci-dessus,

4° — Le développement des organes administratifs spécialisés,

5° — Les expériences pour le perfectionnement de la procédure administrative et la simplification de sa technique.

Il proposa ensuite comme sixième thème l'adoption du thème intitulé: Le développement de l'Administration de la capitale, comme aussi des grandes villes hongroises et européennes dans l'ère bourgeoise après la deuxième guerre mondiale. Dans l'organisation de la chaire d'histoire du droit de Hongrie et avec le concours de l'Académie des Sciences de Hongrie et des autres institutions associées il serait à notre tour d'organiser la conférence d'histoire du droit de nature internationale projetée pour le premier semestre 1976 traitant les problèmes d'histoire de l'Administration des grandes villes de l'Europe centrale, avec la participation des pays socialistes, respectivement des spécialistes de quelques États occidentaux.

M. *István Kállay*, chef de section a pris, au fond, position pour un pareil ordre des thèmes. Sous deux rapports il a fait des complètements:

a) pour les recherches d'archontologie en cours aux Archives Nationales, ensuite

b) il a attiré l'attention sur le domaine de l'administration privée, dont les objets sont en même temps ceux de l'administration publique aussi. Quant aux thèmes respectifs, il a souligné les résultats des collaborateurs de l'Archive, obtenus jusqu'à présent dans l'examen des branches spéciales de l'administration, ensuite, pareillement à l'étude de plans, comme aussi en connexion avec l'opposition de M. *Kálmán Kovács* il a apprécié le concours déployé sur la base de l'histoire par les offices des Archives Nationales (des répertoires, des inventaires informatifs); ainsi que travaille

des archives territoriales mettant à jour l'histoire locale de l'administration.

Il s'est occupé en particulier des questions de la publication aussi. A côté des volumes consacrés à l'étude de l'histoire de l'administration publique projetés dans des volumes paraissant annuellement en étendue de cca 25 feuilles, il a souligné la possibilité de la publication dans les revues archivistiques aussi (Revue Archivistique, Publications Archivistiques); ensuite dans les annuaires rédiges par les archives territoriales.

Dans la discussion de l'étude de plan les interventions étaient rattachées à certains thèmes, respectivement à certaines époques. A l'égard de ce qui précède, aux problèmes de la procédure et de la technique administratives, en connexité avec la réforme actuelle du maniement des documents, M. *Oszkár Sashegyi* a analysé le rôle important des archives, ses expertises et les rapports théoriques de celles-ci.

Les conditions personnelles, matérielles etc. des fonctionnaires à l'époque entre les deux guerres et les effets, les conséquences de celles-ci, les questions de la mobilité ont figuré dans l'intervention de M. *Elek Karsai*.

C'est surtout en connexion avec les archives territoriales que s'est présentée l'exigence de l'examen parallèle et réciproque de l'histoire de l'administration publique et de l'histoire politique. M. *Gábor Farkas* a accentué le rôle déterminant de celle-ci dans l'examen des différences existant entre les comitats et les villes et de la formation différente de la structure administrative.

En connexion avec cela est intervenu M. *György Wiener* dans sa qualité de représentant de l'Institut d'Organisation de Conseil de l'Académie de Conseil. Il a informé ses auditeurs que dans le travail d'analyse en rapport avec les problèmes de l'administration de la commune, de l'arrondissement, du comitat, l'Institut voulait baser ses recherches sur les résultats des recherches historiques aussi. En première ligne c'est l'analyse des questions sur les particularités des unités territoriales, sur le développement des fonctions de l'administration des colonies, sur l'affirmation de l'intervention de l'Etat etc. qui est indispensablement importante. Une collaboration efficace est nécessaire dans les thématiques sur la sphère d'action et les particularités des fonctions communales et municipales en rapport avec l'administration du comitat et l'administration régionale.

Sur la base des opinions et des points de vue exposés, M. *Lajos Lőrincz*, le secrétaire du Conseil Coordonnateur a voulu accentuer intensivement la nature complexe de la direction principale de recherche intitulée : Le développement de l'administration publique. Vu que les objectifs réels ne peuvent être obtenus qu'avec la collaboration de plusieurs domaines spéciaux, il a sollicité de prendre pour base dans le choix des thèmes de l'histoire de l'administration publique, ainsi que dans leur hiérarchisation, les 12 thèmes — spécifiés ci-dessus — figurant dans le plan perspectif national. En connaissance de ce qui précède il s'est déclaré d'accord sur le contenu des thèmes recommandés par le professeur *Kovács*, respectivement sur ses propositions présentées pour la répartition des objectifs. Comme deuxième pas, il a attiré l'attention sur le collationnement des plans avec les autres unités de recherche, puisque la somme destinée au financement des thèmes constitue la fonction des dépenses des organes exigeant les recherches relatives à l'histoire de l'administration publique.

La série des interventions de la séance de discussion fructueuse a été fermée par M. *Győző Ember*, académicien. Il a apprécié l'étude de niveau élevé du professeur *Csizmadia* comme le point de départ important dans la participation des travaux de la direction principale de recherche. Il a mis sous point d'interrogation le « genre » de l'exposé, car cela n'a pas tout à fait rempli les conditions des critères de l'étude de plans. Dans le travail a dominé en premier lieu la volonté de mesurer

l'étendue du domaine de la science. Or, le recensement des résultats obtenus et la levée de la carte des déficiences sont des éléments nécessaires de chaque planification. On ne peut rédiger des objectifs réels qu'avec leur concours. Eu égard à tout cela c'est le plan perspectif qui a une importance primaire, c'est-à-dire la détermination des objectifs les plus importants, et seulement ultérieurement peut suivre le plan à moyen terme, lequel, au fond, n'est pas autre chose que l'établissement de la capacité de ceux sur qui on peut compter dans le travail. Il a renvoyé ensuite aux tâches concrètes qui succèdent nécessairement à cette conférence.

Le professeur *Andor Csizmadia* dans sa réponse récapitulative considère nécessaire dans le travail suivant de tenir compte des corrections et propositions des opposants et des intervenants dans la discussion, en soulignant son opinion que le but de son étude de plans était l'établissement de la situation, l'esquisse des domaines de la collaboration.

La première conférence de recherches sur l'histoire de l'administration publique en connexion avec la direction principale de recherche intitulée: «La base scientifique du développement complexe de l'administration publique» a exécuté l'œuvre de l'établissement des principes, en indiquant l'élaboration détaillée des objectifs des années suivantes et les nécessités de l'exécution efficace des recherches.

G. MÁTHÉ

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[1] Edited by Lajos *Nagy* and Katalin B. *Veredy*.

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[1] Библиографию составили Л. *Надь*—К. Б. *Вереди*.

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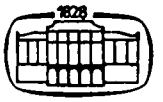

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Gesetzgebungsmittel der Familienpolitik

von

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In Ungarn wendeten der sehr hohe Prozentsatz der geschiedenen Ehen, die sehr niedrige Geburtenziffer und das sehr hohe Niveau der Inanspruchnahme der legalen Schwangerschaftsunterbrechungen die Aufmerksamkeit der Gesellschaft und der Regierung in Richtung des Instituts der Ehe und der Familie. Dem folgten sehr bedeutende familienpolitische Maßnahmen aufgrund der Verfassung vom Jahre 1973 im Sinne eines weitgreifenden bevölkerungspolitischen Regierungsbeschlusses und im Rahmen der Revision des Familiengesetzes vom Jahre 1952 (im weiteren UFG). Der Aufsatz betrachtet den Kreis der wünschenswerten Maßnahmen bezüglich der Bevölkerungspolitik noch nicht als abgeschlossen und sucht nach Klärung einiger grundlegender Fragen neben den schon in Anspruch genommenen Gesetzgebungsmitteln jene, die noch in Anspruch genommen werden könnten. Nach Analyse des Begriffes der Familie und der Ehe, sowie nach Absonderung des Familienrechtes als Rechtszweig wird zwecks Verringerung der Ehen, die keinen Bestand versprechen, die Einschaltung einer vorgeschriebenen Bedenkzeit vorgeschlagen, das Binden der operativen Schwangerschaftsunterbrechung an gewisse Bedingungen bewertet und die Lösung der Mutterschaft und der ehegüterrechtlichen Lage der arbeitenden Frau im Einklang mit der ausgebildeten wirtschaftlichen Lage, der Weg der Rettung der zwecks Scheidung vor das Gericht gebrachten, aber sozial noch funktionsfähigen Ehen durch gesellschaftliche Mittel gesucht. Es werden die möglichen Mittel des Schutzes der inneren Ordnung der Ehen gegen äußere Angriffe (Ehebruch, andere störende Handlungen) untersucht. Abschließend wird die Bildung einer auf das ganze Land sich erstreckenden Organisation vorgeschlagen, die zur Verwirklichung der verschiedenen Aufgaben des Familienschutzes berufen wäre.

Allgemeine Fragen

Einleitung

I. Die Ursachen dessen, daß sich die Staatsorgane und die gesellschaftlichen Organisationen insbesondere in den vergangenen Jahren mit der harmonischen Einfügung des Instituts der Ehe und der Familie in die aufzubauende Gesellschaftsordnung so weitgreifend und eingehend befaßten, sind: a) der sehr hohe Prozentsatz der geschiedenen Ehen; b) die sehr geringe Zahl der natürlichen Bevölkerungszunahme; c) die sehr starke Inanspruchnahme der zugelassenen Schwangerschaftsunterbrechungen.

Es können die Ursachen dieser Erscheinungen festgestellt werden und es müssen in ihrer Reihe auch gewisse positive Züge der Entwicklung beobachtet werden, die aus wirtschaftspolitischen oder rechtspolitischen Gründen nicht mehr rückgängig

gemacht werden dürfen.[1] Es ist aber sicher, daß auch die sozialistische Familie die wichtige Aufgabe hat für den *Nachwuchs der Bevölkerung* zu sorgen.

Drei Ereignisse bedeuteten in der ungarischen Familienpolitik eine wesentliche Wendung:

1. Der neue Text der Verfassung, der den Schutz des Instituts der Ehe und der Familie aus dem Kapitel über die Rechte und Pflichten der Staatsbürger (§51) in die Reihe der Bestimmungen übertrug, die die strukturellen Grundlagen der sozialistischen Gesellschaftsordnung zusammenfassen (§15);

2. der Ministerratsbeschluß Nr. 1040/1973, vom 18. Oktober 1973, über die bevölkerungspolitischen Aufgaben;

3. die Schaffung des Gesetzes I vom Jahre 1974, das das Gesetz IV vom Jahre 1952 über die Familie, die Ehe und die Vormundschaft abändert und einen einheitlichen Text festlegt (UFG).

Der Regierungsbeschluß möchte durch vielseitige Maßnahmen der Steigerung der Standhaftigkeit der Familien und der Erhöhung der Geburtenziffer dienen.

Wie weitgehend und vollkommen befriedigend die ungarische Gesetzgebung auf dem Gebiet des Familienrechts auch bis jetzt ihren Aufgaben nachgekommen ist, beweist ein vorzüglicher zweibändiger Kommentar des 20 Jahre alten Familiengesetzbuches[2] und der Umstand, daß bei der modifizierten neuen Fassung des Gesetzbuches im Jahre 1974 so wenig – wenn auch nicht unwichtige – Änderungen erforderlich waren, daß damit der erwähnte Großkommentar keineswegs als überholt betrachtet werden kann und nur in wenigen Punkten eine Berichtigung erwünscht.

Die Regierung erwartet von den zuständigen Organen über die Ergebnisse der Maßnahmen zeitweise einen Bericht. Diese Berichte können weitere Maßnahmen nach sich ziehen und so kommt vielleicht einmal die Reihe auch in Ungarn – wie es in anderen Volksdemokratien bereits erfolgt ist – zu einer neuen umfassenden Regelung des gesamten Familienrechtes. Ich möchte zum Material dieser umfassenden, evtl. nicht sehr entfernten Regelung durch die Erörterung einiger Probleme beitragen, die in den möglichen Regelungskreis der Gesetzgebung fallen.

Indem ich meine Ausführungen auf die Frage der Gesetzgebung richte, möchte ich die Gesichtspunkte anderer Wissenschaftszweige keineswegs außer acht lassen.

[1] Prof. MÜLLER-FREIENFELS, (Freiburg) weist in seiner neuesten Studie, die er in einer für mich sehr verehrenden Weise auch als eine Besprechung meiner Arbeit *Order of the Family* kennzeichnet, darauf hin, daß ich die der Stabilität und dem moralischen Inhalt der Familienbeziehungen gegenüberstehenden Erscheinungen nur in der kapitalistischen Gesellschaft erkenne. *(Zur Diskussion um die systematische Einordnung des Familienrechts.* – Rabels Zeitschrift für ausländisches und internationales Privatrecht, 4/1973. p. 609., 613–14. – II. Teil der Studie 2–3/1974. p. 533–570.) Bei den seit der Publikation meiner Arbeit aufgetretenen bzw. verbreiteten Erscheinungen wäre es schwer mich gegen diesen Vorwurf zu verteidigen.

[2] BACSÓ–CSIKY–PETRIK–SZIGLIGETI–TALLÓS: *A családjogi törvény magyarázata* (Kommentar zum ungarischen Familiengesetz). – Redigiert von V. SZIGLIGETI und J. BACSÓ. Budapest, Közgazdasági és Jogi Könyvkiadó, 1971. I–II. Band. 1532 Seiten mit Bibliographie, Rechtsnormenverzeichnis und Sachregister.

Ganz im Gegenteil! Die sozialistische Rechtswissenschaft erkannte nämlich gerade auf dem Gebiet des Familienrechtes viel früher als auf anderen Rechtsgebieten, die Notwendigkeit der Beachtung der Ergebnisse anderer Gesellschaftswissenschaften, insbesondere der Soziologie.[3]

II. Es besteht kein Zweifel darüber, daß die ungünstigen Erscheinungen um das Institut der Familie und der Ehe in keinem kausalen Zusammenhang mit den Grundlagen stehen, die sich in den Staaten des Aufbaus des Sozialismus ausbilden.

Das Gemeinsame in dem, den Sozialismus aufbauenden und im kapitalistischen System ist der Zusammenbruch jener Ehe, die auf der Gewalt des Familienvaters, auf seinem, gegenüber der Gattin zur Geltung kommenden entscheidenden Wert und auf der über die Kinder unter Ausschluß der Frau zur Geltung kommenden väterlichen Gewalt beruhte, an manchen Orten sogar auch in vermögensrechtlicher Beziehung sämtliche Rechte der Frau an sich reißend. Damit im Zusammenhang war es verboten irgendeine Abstammungsbeziehung festzustellen zwischen einem außerehelichen Kind und einem Ehegatten als dessen Vater.[4]

Zwischen den Regeln der beiden Gesellschaftsordnungen bestehen dennoch grundsätzliche Unterschiede, auch wo sie die gleiche Tendenz aufweisen.[5]

Gemäß dem Standpunt von *Olympiad S. Joffe,* den er auf der Konferenz von Jena vorgetragen hat, ist der Unterschied zwischen den beiden Gesellschaftsordnungen in der natürlichen, wirtschaftlichen und ideologischen Funktion der Familie, die deren Hauptfunktionen sind, der, daß „die sozialistische Einehe nicht auf Privateigentum beruht, sondern daß die gegenseitige Liebe zwischen zwei Vertretern verschiedener Geschlechter die natürlich wahrnehmbaren und gesellschaftlich gebilligten Motive der Ehe bilden; – die Beziehungen zwischen... Mitgliedern der Familie rein von privaten Bestrebungen und rein dem Prinzip der Herrschaft... auf gegenseitiger Achtung, gegenseitiger materieller Unterstützung und gegenseitigem geistigen Einfluß beruhen, der der allgemeinen Aufgabe der kommunistischen Erziehung unterworfen ist". Weiterhin: „daß die Familie aufgehört hat eine geschlos-

[3] Vergl. HALGASCH, R.: *Soziologische Aspekte des Familienrechts im Sozialismus.* – 3. Internationale Familienrechts-Konferenz, 21.–24. Oktober 1969. Jena, – Wissenschaftliche Zeitschrift, (Friedrich Schiller Universität Jena) 1970. p. 971.

[4] « ... la législature ne fait pas naître au droit des rapports de fait qui peuvent exister en dehors de l'union officielle d'un homme et d'une femme. Juridiquement, il n'exist qu'un seul typ de famille, ordonnée autour du mariage et de la filiation qui trouve en lui son origine.» – Prof. Mme. M. GOBERT in ihrem Vortrag in Budapest, 5. Juni 1972. – Acta Juridica, 1–2/1973. p. 5.

[5] Bezüglich der Gleichberechtigung der Frauen schreibt GY. EÖRSI über die Konvergenz der beiden Rechtssysteme folgendes: „... zweifellos ist die Gleichberechtigung der Frauen eine Tendenz auf der ganzen Welt. Auch daran kann kaum gezweifelt werden, daß die sozialistischen Rechte in dieser Frage den bürgerlichen Rechten vorangehen. Aber auch das ist unzweifelhaft, daß sich in dieser Frage eine solche Konvergenz zeigt, die nicht formell, technisch ist, sondern in einem gewissen Grade... auch wirtschaftlich und gesellschaftlich". „... die Tendenz der Gleichberechtigung der Frauen kann teils auf die Änderungen in den Produktionskräften zurückgeführt werden ... die Erscheinung der Urbanisation führte zur massenhaften Einstellung der Frauen in die Arbeit. Die Einstellung der Frauen in die Arbeit brachte gesellschaftlich, aber hauptsächlich wirtschaftlich solche Änderungen mit sich, die unvermeidlich den Prozeß der Gleichberechtigung der Frauen ... in die Wege leiteten." *A konvergencia problémái a polgári jogban* (Probleme der Konvergenz im bürgerlichen Recht). Állam- és Jogtudomány, 3/1972. p. 431., 433.

sene Zelle zu sein... und als Träger von Interessen, die sich harmonisch mit den gesellschaftlichen Interessen verbinden, von dem sozialistischen Staat und der Gesellschaft nicht nur anerkannt, sondern auch unterstützt wird".[6]

Im sozialistischen Staat ruft die Förderung, die Steigerung der gesellschaftlichen, politischen und wirtschaftlichen Rolle der Frauen, neben der Erfüllung ihres besonderen Berufs als Frau, wichtige Gesetzgebungsaufgaben ins Leben, mit deren Erfüllung das Suchen jener Mittel nicht im Gegensatz steht, die der Frau ermöglichen bzw. zulassen, die Lebensform des Haushaltes und der Kindererziehung zu wählen. Auch in der sozialistischen Gesellschaft ist die Möglichkeit der freien Wahl als Ideal zu betrachten, wozu auch wir in Übereinstimmung mit *Egon Szabady* uns bekennen.[7] Im kapitalistischen System ist dagegen die Anschauung über die Wiederherstellung der alten Lage der Frauen – zwar auch dort überholt – aber geeignet ein Diskussionsgegenstand zu sein.

Auch der Standpunkt der katholischen Kirche ist nicht mehr negativ.

Gesetzgebungsaufgaben und die Verfassung

Das Wesen der Gesetzgebungsaufgabe während des Aufbaus des Sozialismus ist die Festlegung der Funktion der Ehe und der Familie, bzw. ihrer neuen Funktion und ihre Übereinstimmung mit den individuellen gesellschaftlichen Aufgaben der Ehegatten und anderer Familienmitglieder.

Hinsichtlich der Gestaltung der Rechtsstellung der Familie gestalten sich die Rechtsregeln mit unmittelbar familienrechtlichem Charakter so speziell, daß diese Momente einen bedeutenden Faktor der Betrachtung des Familienrechtes als eines selbständigen Rechtszweiges liefern.

Ein besonderes Moment ist auch, daß die familienrechtlichen Berechtigungen in vielen Beziehungen zugleich als Verpflichtungen erscheinen, sogar die Abfassung als Berechtigung bezweckt die Förderung der Erfüllung einer Pflicht.

Eine Besonderheit *der zu beanstandenden ungarischen tatsächlichen Lage* ist, daß die ungünstigen Erscheinungen nicht *infolge gewisser, seitens der Staatsgewalt einfach übersehener Verhaltensweisen* unerwünscht wurden, und der Staat dies einfach zur Kenntnis nimmt, sondern daß die Lage überall mit der Assistenz der in ihrem Wirkungskreis, bzw. Aufgabenkreis gesetzlich vorgehenden Behörden oder Gesundheitsorgane zustande gekommen ist, gleichgültig ob wir die Gerichtsverhandlungen, die gynäkologischen Abteilungen der Krankenhäuser, oder die ärztli-

[6] JOFFE, O.S.: *Die sozialistische Familie und das sozialistische Familienrechtsverhältnis.* – S. Anm. 3, op. cit. p. 983.

[7] „Zu dem idealen Zustand, daß die Frauen frei unter den Möglichkeiten wählen können, sind die notwendigen materiellen und arbeitsorganisatorischen Bedingungen heute noch nicht gegeben. Die Schaffung der Bedingungen hängt in erster Reihe vom Tempo unserer gesamten wirtschaftlichen Entwicklung ab." SZABADY, E.: *Kereső foglalkozás és anyaság – a nők helyzete Magyarországon* (Erwerbstätigkeit und Mutterschaft – die Lage der Frauen in Ungarn.) *Tanulmányok a nők helyzetéről* (Studien über die Lage der Frauen). Budapest, Kossuth Kiadó, 1972. p. 231.

chen Rezepte bezüglich antikonzeptiver Mittel betrachten. Nicht die individuellen menschlichen Verhaltensweisen sind es, die widerrechtlich sind, sondern sie werden durch ihre große Menge unerwünscht.

Aus dieser Lage könnte die Resignation einen Ausweg bedeuten, die die Ehe nur mehr als eine gesellschaftlich anerkannte äußere Form gewisser Beziehungen bewerten würde, oder aber eine vom Charakter des Familienrechtes abweichende kogente gesetzliche Regelung, die provisorisch ein mit Beispielen nachweisbares Ergebnis aufweisen könnte.

Wenn aber irgendwo, so doch auf dem Gebiet des Familienrechtes muß jene Funktion des sozialistischen Rechtes zur Geltung kommen, die auf die Bewertung, auf das Gewissen der Mehrheit der Gesellschaft baut und bestrebt ist ein dementsprechendes allgemeines menschliches Verhalten auszugestalten.

Eine solche Stellungnahme wurde seitens der Gesetzgebung – als eines zum Ausdruck des Willens des werktätigen Volkes in erster Reihe berufenen Organs – am besten bekräftigt, und zwar in der Verfassung (Ges. I vom Jahre 1972), an das sich der Regierungsbeschluß Nr. 1040/1973 logisch anschließt.

Im VIII. Kapitel der Verfassung vom Jahre 1949, über die Rechte und Pflichten der Staatsbürger, besagt § 51 folgendes: „Die Ungarische Volksrepublik schützt das Institut der Ehe und Familie." Diese Stellung im System verlieh der Bestimmung den Sinn, bzw. war sie auch auf die Weise zu deuten, daß die Eheschließung, die Familiengründung dem Wesen nach ein grundlegendes Recht der Staatsbürger ist.

Das Gesetz I:1972 bezeichnete den Schutz des Instituts der Ehe und der Familie mit demselben Text, aber die Bestimmung wurde in den §15 übertragen, d.h. in die Reihe jener Bestimmungen, die die wesentlichen Grundlagen der sozialistischen Gesellschaftsordnung zusammenfassen.[8]

Hinsichtlich des Familienrechtes bedeutet diese Änderung, daß die Familie als Grundzelle der sozialistischen Gesellschaft betrachtet wird. Meiner Ansicht nach bedeutet aber diese Änderung der Stelle im Text noch viel mehr. *Engels* stellte von den neuen sozialistischen Menschen fest, daß jene sich nicht mehr mit der im bürgerlichen Zeitalter vorherrschenden Meinung kümmern werden, was sie zu tun haben, sondern daß sie selbst ihre Lebensordnung und die dieser Lebensordnung entsprechende öffentliche Meinung ausgestalten werden.[9] Der neue systematische Aufbau der Verfassung drückt besser den Standpunkt der nach Engels dazu berufenen Generation aus, als die frühere Verfassung es getan hatte. Das bedeutet zugleich, daß der Staat hinsichtlich des Instituts der Ehe und der Familie größere Aufgaben übernommen hat, und ein größerer Raum für die Inanspruchnahme der Mittel der Gesetzgebung eröffnet wurde. Es können als erste entscheidende Schritte auf diesem breiteren Terrain jene betrachtet werden, auf welche wir hingewiesen haben.

[8] BIHARI, O.: *Alkotmányreformunk jelentősége* (Bedeutung unserer Verfassungsreform). Jogtudományi Közlöny, 1973. p. 60.

[9] ENGELS, F.: *Der Ursprung der Familie, des Privateigentums und des Staates.* Berlin, Dietz, 1951. p. 198.

Begriff der Ehe und der Familie

a) Die Ehe

Bezüglich der Definition der Ehe sind in den Rechtsnormen und in der Literatur zwei extreme Standpunkte zu treffen. Der eine sucht jenes Minimum der Begriffselemente, die in jeder, das gesetzliche Bild der Ehe aufweisenden Erscheinung zu erkennen sind. Der andere erwähnt auch jene Elemente als Begriffselemente, die hinsichtlich der Familienpolitik erwünschte Kennzeichen der ihre gesellschaftliche Aufgabe erfüllenden Ehen sind, obwohl sie natürlich nicht in jeder Ehe vorhanden sind.

Eine sehr reelle Auffassung erscheint im §1 des UFG, der nicht über die Begriffselemente der Ehe spricht, sondern zum Ziel des Gesetzes setzt, daß das Institut der Ehe und der Familie entsprechend der Gesellschaftsordnung der Ungarischen Volksrepublik und der sozialistischen Moral geregelt werde.

Die familienrechtlichen Gesetzgebungen einzelner sozialistischer Länder stellen ebenfalls einwandfrei statt einer Tatsachenfeststellung eine Zielsetzung auf. Das ist der Charakter des Familiengesetzes der DDR vom 20. Dezember 1965, in dem § 5 Abs.(1) besagt: „Mit der Eheschließung begründen Mann und Frau eine für das Leben geschlossene Gemeinschaft, die auf gegenseitiger Liebe, Achtung und Treue, auf Verständnis und Vertrauen und uneigennütziger Hilfe füreinander beruht." Nicht so ausgeprägt, sondern eher auf den bei der Eheschließung angenommenen guten Willen und nicht auf das Kennzeichen aller Ehen weist § 1 des tschechoslowakischen Gesetzes hin mit dem Hinweis, daß die Ehe aufgrund einer freiwilligen Entscheidung des Mannes und der Frau geschlossen wird mit dem Ziel, eine harmonische, feste und dauerhafte Lebensgemeinschaft zu gründen.

Jene Lösungen, die sich an die tatsächliche Lage anpassen wollen, mit den Worten von *Imre Szabó* dieselbe sozusagen ertragend, rechnen schon im vorhinein mit den beschränkten Möglichkeiten der Anwendung der Rechtsnorm.

Jedenfalls weist auf die „Volkstümlichkeit" der Form der Ehe jene Angabe der Volkszählung vom Jahre 1970 hin, wonach von den insgesamt 8 148 600 Personen über 15 Jahren (Männer und Frauen zusammen) 5 442 200 d. h. 66,7 % verheiratet waren. Dagegen waren nach den Angaben vom Jahre 1930 von 6 292 864 Personen desselben Alters 3 738 476, d. h. nur 59,4 % verheiratet.

b) Die Familie

I. Über den Begriff der Familie spricht die Einleitung des Familiengesetzes der DDR vom Jahre 1965 folgenderweise: „Die Familie ist die kleinste Zelle der Gesellschaft. Sie beruht auf der für das Leben geschlossenen Ehe und auf den besonders engen Bindungen, die sich aus den Gefühlsbeziehungen zwischen Mann und Frau und den Beziehungen gegenseitiger Liebe, Achtung und gegenseitigen Vertrauens zwischen allen Familienmitgliedern ergeben."

Dieser Text, dem keine Begriffsbestimmung im UFG entspricht, drückt zwar eher einen Wunsch aus, aber auch vom Standpunkt des ungarischen Rechtes *aus* ist es sicher, daß die *Familie eine aus den Ehegatten, aus den von ihnen als gemeinsamen Vorfahren abstammenden Nachkommen bestehende, dauerhafte, mehr oder minder organisierte Einheit bedeuten muß, in der die Teilnehmer in einer wechselseitigen Beziehung zueinander stehen und die auf ihr ganzes Verhalten auswirkt.*

Die aus dem überlebenden Ehegatten und den gemeinsamen Kindern bestehende Gemeinschaft verliert nicht den Familiencharakter mit dem Tode des anderen Ehegatten oder wenn sie mit den Eltern der Ehegatten die Form einer als Ausnahme zu betrachtenden Großfamilie aufnimmt.

II. Als Reflexwirkung des Familienschutzes und infolge der Bestrebung der sozialistischen Familienpolitik, jede Diskrimination aufzuheben, muß der Familienschutz im Interesse des Kindes auch auf jene Gruppe ausgedehnt werden, die ohne Eheverband zusammenleben, und zwar auch dann, wenn der Vater unbekannt ist, oder nicht mit dem Kind oder der Mutter zusammenlebt.

Das ungarische Recht regelt die Rechtsstellung des Lebensgefährten in vielen Bezügen günstig.

Das außereheliche Zusammenleben verdient eher eine gewisse günstigere Beurteilung in dem Falle, wenn die Parteien ohne eigenes Verschulden keine Ehe schließen können, oder die Eheschließung eine der Parteien bezüglich des Vermögens schwer treffen würde.

Zwei solche Fälle sind hervorzuheben. Der eine ist, wenn das Gericht eine frühere Ehe einer der Parteien wegen Festhaltens ihres Ehegatten an das Eheband nicht scheidet.

Der andere Fall ist eine Besonderheit des ungarischen Rechtes. Das ungarische ZGB § 607 Abs.(4) begünstigt mehr als jedes ausländische Recht die *kinderlose* verwitwete Person. Nach dieser Bestimmung erbt der Ehegatte, wenn kein Nachkomme vorhanden ist. Er erbt also das ganze Vermögen des Verstorbenen, sogar vor dessen Eltern und Geschwistern. Dieses ausschließliche Erbrecht ist allein durch das Institut des Rückfallerbrechtes einigermaßen eingeschränkt. (ZGB §§ 611–613)[10] Im Falle des Vorhandenseins von Abkömmlingen erbt der verwitwete Ehegatte gar nichts am Bestand des Nachlasses, sondern es kommt ihm bloß die Nutznießung jenes Vermögens zu, das von den Nachkommen geerbt wird. Schließlich besagt § 615 Abs.(2), daß auch dieses Nutznießrecht des verwitweten Ehegatten aufhört, wenn er eine neue Ehe eingeht.

Es ist also nicht überraschend, daß die verwitwete Person nicht sehr geneigt ist eine Ehe einzugehen, die mit schwerem Vermögensnachteil verbunden ist.

[10] Rückfallerbrecht findet statt, wenn der gesetzliche Erbe nicht der Abkömmling des Erblassers ist (sondern z. B. der verwitwete Gatte), und zwar für den Vermögensgegenstand, der auf den Erblasser von einem Vorfahren zugekommen ist (eventuell durch Vermittlung eines Bruders oder einer Schwester). In diesem Fall entzieht der Verwandte des Gatten von der Witwe den Vermögensteil, der von seinem und des Verstorbenen gemeinsamen Vorfahren stammte. Das Gesetz kennt mehrere Ausnahmen.

Das Familienrecht als Rechtszweig

Jene Mittel der Gesetzgebung, die der Verwirklichung der Familienpolitik dienen, unterscheiden sich in ihrem Charakter von der Regelung der Vermögensrechtsverhältnisse der Staatsbürger untereinander. Die neue Einstellung des Schutzes der Ehe und der Familie in die Verfassung erhöhte auch die Bedeutung jener Frage, ob das Familienrecht ein selbständiger Rechtszweig des sozialistischen Rechtssystems ist. [11]

Meinerseits hielt ich von allem Anfang an nicht für wesentlich, ob das Familienrecht ein selbständiger Rechtszweig *genannt wird* und so in das Bild vom gesamten Rechtssystem eingereiht wird, sondern, daß die *volle, zusammenfassende Regelung* der Familienverhältnisse, die sich in eine besondere Atmosphäre einfügen lassen, die Erfordernisse der Gesetzgebung und den Bedarf der Praxis erfüllt.

Wenn auch *Imre Szabó* in der ungarischen Literatur berechtigt findet, daß die familienrechtlichen Verhältnisse für eine verhältnismäßig selbständige Verhältnisart angesehen werden, so fügt er gleich hinzu, daß diese Verhältnisarten auch im Vergleich zueinander ein sehr kompliziertes Bild aufweisen.[12]

In der Literatur der Sowjetunion ist die wissenschaftliche Begründung des Charakters eines selbständigen Rechtszweiges, daß obwohl das Familienrecht sowohl im Verhältnis zwischen den Ehegatten, wie auch im Verhältnis zwischen Eltern und Kindern zahlreiche Vermögensverhältnisse berührt, in der sozialistischen Gesellschaft jedoch weder die Verhältnisse zwischen den Eheleuten, noch die zwischen Eltern und Kind grundlegend auf Vermögensverhältnisse zurückzuführen sind.[13]

Im Gegensatz zu diesem Standpunkt finden wir jene entschiedene Stellungnahme von *Joffe,* wonach jene Unterschiede, die zwischen den Familienrechtsverhältnissen und den Zivilrechtsverhältnissen bestehen, keine entsprechende Grundlage für die Anschauung des selbständigen Rechtszweiges liefern, weil auch andere Rechtsverhältnisse im Rahmen des Zivilrechtes, die keinen selbständigen Rechtszweig bilden, untereinander ziemlich verschieden sind. Nach *Joffe* sind aber die die *Rechtsstellung innerhalb der Familie bestimmenden bzw. beeinflussenden Rechts*handlungen jene, die einen *wahren Rechtscharakter aufweisen,* nicht aber die Verhaltensregeln der Familienmitglieder untereinander, die die Grundlage der Familie bilden. Mich erinnert diese Anschauung an den Standpunkt von *Savigny,* wogegen ich beweisen wollte, daß eben jene *Willensäußerungen,* die die Rechtsstellung in der Familie abändern oder beeinflussen, ferner die Bedingungen und Folgen der Rechtsfähigkeit, der Handlungsfähigkeit, des Willenmangels und schließlich der

[11] „Das Familienrecht (ist) nach kommunistischer Lehre gar nicht Zivilrecht." – MÜLLER-FREIENFELS: *Ehe und Recht.* Tübingen, Mohr, 1962. p. 92.

[12] SZABÓ, I.: *A jogelmélet alapjai* (Grundlagen der Rechtstheorie). Akadémiai Kiadó, 1971. p. 89.

[13] Über die Anschauungen in der sowjetischen Literatur gibt MÜLLER-FREIENFELS einen weiten Überblick: op. cit. p. 620. Anm. 40; p. 625, 626.

Ungültigkeit, von den allgemeinsten Regeln des Zivilrechtes ausgenommen sind, bzw. sie die Anwendung dieser Regeln auf sich nicht ertragen.[14]

Ich betrachte auch weiterhin als gesellschaftlichen Bedarf, daß jene Wissenschaftszweige und Gesellschaftsorgane, die berufen sind sich mit den Familienangelegenheiten zu befassen, die Rechtsregeln, die diese berühren, womöglich als Ganzes betrachten können und nicht oder nur sehr selten gezwungen sind, die Möglichkeiten des vollen Verständnisses der Familienrechtsnormen auf für sie fremden Rechtsgebieten zu suchen.

Wenn jemand diese meine Ansicht annimmt, aber im Familienrecht einen Teil des Zivilrechtes sieht, der allein aus rechtstechnischen Interessen davon abgetrennt werden soll, wird dem Wesen nach mit mir gleichen Weges gehen.

Einige Detailfragen

Einleitung

Ich muß darauf verzichten, über die Möglichkeiten der Gesetzgebung im Dienste der Familienpolitik und über die Grenzen dieser Möglichkeiten in allen ihren Aspekten zu sprechen.

Im weiteren möchte ich bloß versuchen folgende Fragen der Familienpolitik zu beleuchten:

Beseitigung der zur Erfüllung ihrer gesellschaftlichen Aufgabe von vornherein als ungeeignet erscheinenden Ehen, insbesondere solcher Ehen der Minderjährigen, sowie andere Fragen der Gefährtenwahl; Fragen im Zusammenhang mit der Bevölkerungspolitik; die Stellung der arbeitenden Frau, insbesondere in vermögensrechtlichen Beziehungen; Beseitigung der nicht ernstlich überlegten Scheidung der sozial funktionsfähigen Ehen; Rechtsschutz für den inneren Frieden der Ehe und der Familie gegen äußere Angriffe; schließlich der Ausbau einer einheitlichen, das ganze Land umfassenden Organisation des Familienschutzes.

Ehen, die ungeeignet sind ihre wahre Aufgabe zu erfüllen

I. Wenn wir auch sehen, daß ein verhältnismaßig großer Teil der Bevölkerung über 15 Jahren verheiratet ist, oder die hohe Zahl der Eheschließungen wahrnehmen (in 1973, 101 561, d. h. 9,7 je 1 000 Einwohner), müssen wir auch wissen, daß die Verwirklichung der gesetzlichen Form der Eheschließung bloß die rechtliche Anerkennung der Beziehung zwischen zwei Personen bedeutet.

[14] NIZSALOVSZKY, E.: *Order of the family.* Budapest, Akadémiai Kiadó, 1968. Part III. – JOFFE behauptet dagegen, daß „die Eheschließung kein Rechtsereignis, sondern eine rechtmäßige Handlung nach der Art eines Rechtsaktes (ist), da hierbei die ausdrückliche Absicht besteht, bestimmte Rechtsfolgen herbeizuführen... Trotzdem darf die Ehe im Sozialismus... nicht als eine Art der zivilrechtlichen Rechtsgeschäfte angesehen werden." Anm. 3, op. cit. p. 985. Im Zusammenhang mit der Aussage JOFFES über den Rechtscharakter bedeutet diese Behauptung aber soviel, daß gerade das, was seiner Meinung nach dem Recht angehört, nicht unter die Regeln des Zivilrechts fällt.

Prof. *René König* aus Köln sucht die einheitlich auf alle Länder mit entwickelter Industrie sich erstreckende Ursache jener Erscheinung, daß die Zahl der Eheschließungen zwar bedeutend zugenommen hat, damit war aber weder die proportionelle, noch die generelle Zunahme der Geburtsziffer verbunden.[15]

Die Erklärung liegt – nach *König* – darin, daß nicht alle Eheschließungen auf eine auch Kinder vorsehende Familiengründung gerichtet sind. Man müßte seiner Ansicht nach die Ehen, die keine Kinder vorsehen, eigentlich von der Gesamtzahl der Ehen abziehen. Die zwei verschiedenen gearteten Ehen können nicht verglichen werden, weil durch einen Vergleich voneinander verschiedene gesellschaftliche Erscheinungen auf den gleichen Nenner gebracht werden. Ein in Wirklichkeit zahlenmäßig nicht nachweisbarer (nach meiner Meinung tatsächlich geringer) Teil der Ehen ohne Kind ist bloß eine in Form der Ehe legalisierte gemeinschaftliche und geschlechtliche Beziehung.

Das sowjetrussische Familiengesetz verfügt über diese als Scheinehen qualifizierten Beziehungen, daß die Ehe als nichtig erklärt wird, bei der die Partner nicht die Absicht haben, eine Familie zu gründen. (Gesetz vom 30. Juli 1969, § 43 Abs.[1]).[16]

Es darf aber nicht außer acht gelassen werden, daß auch eine bloß als Legalisierung der zeitweiligen geschlechtlichen Beziehungen begonnene Ehe sich festigen kann, deshalb kann die wissenschaftliche Untersuchung die genannte Differenzierung zwischen den Ehen vorläufig nicht bewerten, um so weniger, da viele kinderlose Ehen stabil und ansonsten tatsächlich glücklich sind.

Auch das sowjetrussische Gesetz rechnet mit einer späteren Festigung der fiktiven Ehe, indem es die Nichtigkeitserklärung ausschließt, wenn die Personen, deren Ehe registriert wurde, eine Familie gegründet haben. (Zit. § Abs.[2]).

II. Eine entsprechende Beeinflussung der Partnerwahl könnte ein rechtliches Mittel sein, daß ein möglichst großer Teil der Ehen jener Forderung des sozialistischen Staates entspreche, eine gesunde Grundzelle der Gesellschaft zu werden.

Die Freiheit der Partnerwahl ist aber ein so wesentliches Grundprinzip der sozialistischen Familienpolitik, und zugleich auch des Familienrechtes, worauf keineswegs verzichtet oder das durchbrochen werden könnte. Dagegen verletzt in der sozialistischen Ordnung eine Einrede mit dem Ziel, daß die Partnerwahl von unberufenen Einflüssen befreit werde, die Grundrechte der Staatsbürger nicht. Im Einvernehmen mit den sozialistischen Mitgliedsstaaten ist schon in 1954 an der IX. Sitzung des sozialen und wirtschaftlichen Rates der OVN jener Beschluß zustande gekommen, der die Regierungen zum Kampf gegen den Volksbrauch der Ehen in allzu

[15] KÖNIG, R.: *Die Stellung der Frau in der modernen Gesellschaft. Gynäkologie und Geburtshilfe.* Bd. I Stuttgart, 1967. p. 22. – Ebenso war in Ungarn vor 100 Jahren die Sechs-Kinder-Familie allgemein, dagegen ist heute in 1/3 der Familien kein Kind, im anderen 1/3 nur ein Kind vorhanden. – Nach dem Vortrag von E. SZABADY, vom 22. November 1973.

[16] Die zivilrechtliche prinzipielle Entscheidung Nr. XXVIII des Obersten Gerichtshofes besagt: „Jene Ehe, die von den Parteien schon ursprünglich ohne Absicht des Zusammenlebens und mit dem Entschluß einer Scheidung geschlossen wurde und der auch keine eheliche Lebensgemeinschaft folgte, kann im allgemeinen nicht die Grundlage des Unterhaltes der Frau bilden."

frühem Alter aufforderte. Über die Altersgrenze und die Formalität der Eheschließung wurde sogar ein Abkommensentwurf verfertigt.

Das ungarische Familiengesetz kam sogar mit dem Abkommen im Einklang zustande. Es ist aber nicht ein Erfordernis der sozialistischen Ordnung, die Festlegung der Mündigkeit bei einer niedrigen Altersgrenze, auch nicht, daß die Altersgrenze der vermögensrechtlichen Handlungsfähigkeit übereinstimme, wie es auch im ungarischen Recht nicht in allen Bezügen übereinstimmt. So kann jene Person über 18 Jahren, die gerichtlich beschränkt entmündigt wurde, eine gültige Rechtserklärung – wenn eine Rechtsnorm keine Ausnahme bestimmt – nur mit Zustimmung oder mit Genehmigung ihres gesetzlichen Vertreters abgeben. (Ung. ZGB § 13 Abs.[2]).

Zugunsten der Eheschließung solcher beschränkt handlungsfähigen Personen kommt in unserem Recht eine Ausnahme zur Geltung, weil ihre Ehe ohne Zustimmung oder Genehmigung jeder anderen Person gültig ist.

Gemäß dem ungarischen Recht ist infolge des Alters beschränkt handlungsfähig jene Person – ohne eine besondere Unterscheidung innerhalb der Altersgrenzen –, die das 12. Lebensjahr bereits vollendet hat, aber das 18. Lebensjahr noch nicht erreichte.

Gemäß dem ursprünglichen Text des UFG konnte die Vormundschaftsbehörde grundsätzlich jeder beschränkt handlungsfähigen Person beliebigen Alters und Geschlechtes eine Genehmigung zur Eheschließung geben, also auch jener, die erst das 12. Lebensjahr vollendet hat, obwohl in der Praxis bezüglich des Verfahrens der Vormundschaftsbehörde jene Weisung zur Geltung kam, wonach vor dem Beschluß über die Ausfolgung der Genehmigung die Begründung von allen Seiten geprüft werden mußte. Der Text vom Jahre 1974 bringt schon selbst zum Ausdruck, daß einer minderjährigen Person eine *Genehmigung zur Eheschließung nur in ganz besonders begründeten Fällen ausnahmsweise* ausgefolgt werden darf; und überhaupt nicht einem Mann unter 16 Jahren, sowie einer Frau unter 14 Jahren. (UFG § 10 Abs.[2]). Doch erlaubt das neue Gesetz die Eheschließung dem Mädchen mit vollendeten 16 Jahren ohne solche Genehmigung. Diese Erleichterung wurde damit begründet, daß dem ehereifen 16jährigen Mädchen die Genehmigung sowieso erteilt wurde, besonders im Zustand der Schwangerschaft.

Die Schwangerschaft des Mädchens veranlaßte die Vormundschaftsbehörde tatsächlich oft die Genehmigung auch dann zu geben, wenn ansonsten die Vorbedingungen einer wohlbegründeten Ehe nicht gegeben waren. Das ist auch eine Erklärung dafür, daß der Anteil der kinderlosen Ehen bei Minderjährigen viel niedriger liegt, wie im allgemeinen, dagegen weisen diese Ehen während ihres Bestandes keine höhere Fruchtbarkeit auf.[17] Es ist anzunehmen, daß dieses Motiv auch in der Zukunft bestehen bleibt.

[17] In den ersten drei Jahren der jugendlichen Ehen blieben von 100 Ehen nur 17 kinderlos, aber zwei Kinder entstammten nur aus 18 solchen Ehen, gemäß einer örtlichen Vermessung von Hoóz, J.: *A kiskoruak házasságáról* (Über die Ehe der Minderjährigen). Demográfia, 1/1972. p. 74–88; besonders p. 84–85 und Tabelle 8).

Als Korrektiv gegen das Verbot der Genehmigung der Eheschließung im genannten Kreis wirkt die Erleichterung der Genehmigung der Unterbrechung der außerehelichen Schwangerschaft im Rahmen der Neuregelung der Frage und, daß die Unterbrechung bei Minderjährigen nicht nur bis zur 12. sondern bis zur 18. Woche der Schwangerschaft genehmigt werden darf (Verordnung des Ministeriums für Gesundheitswesen Nr. 4/1973. Eü. M. § 2 Abs.[1] Punkt b), § 3 Abs.[2]).

In der gesellschaftlichen Beurteilung der Frau, die ein außereheliches Kind auf die Welt bringt, hat die Erleichterung der Schwangerschaftsunterbrechung auch vorteilhafte Seiten. Die normale Entbindung des Kindes zeigt, daß die Mutter sich vom drastischen Mittel der Schwangerschaftsunterbrechung abwendet; das muß sich auch in der gesellschaftlichen Beurteilung günstig auswirken.

Das Los des nach der Geburt des Kindes verlassenen Mädchens ist freilich nicht beneidenswert. Sie kann aber einen Trost auch darin finden, daß sie nicht in ein wertloses, ihr viel Leid verursachendes Eheband eingegangen ist, und daß ihr Beispiel vielleicht andere Frauen zu einem verantwortungsvolleren und überlegteren Verhalten führt.

Prof. *König* teilt genaue Angaben für die BRD darüber mit, mit wieviel Monaten die Geburt des ersten Kindes der Eheschließung folgt. Innerhalb der ersten 12 Monate nach der Eheschließung sind dort 201243 Kinder, im zweiten Jahr aber nur mehr 96614 Kinder geboren.

Von den Geburten innerhalb der ersten 12 Monate nach der Ehe entfielen:

auf die 1.– 3. Monate	25886, d.h. 12,85%
auf die 3.– 6. Monate	81183, d.h. 40,32%
auf die 6.– 9. Monate	46212, d.h. 23,00%
auf die 1.– 8. Monate	142586, d.h. 70,08%
auf die 8.–12. Monate	58657, d.h. 29,92%

Aus diesen Angaben für das Jahr 1964 läßt sich entnehmen, daß über zwei Drittel der ersten Kinder in der Ehe aus einem Empfängnis vor der Ehe entstammen.[18]

Die Genehmigung der Eheschließung eines Mannes unter 18 Jahren kann besonders dann zu nichts Gutem führen, wenn er mit einer viel älteren Frau eine Ehe einzugehen wünscht; in solchen Fällen nämlich scheint die zukünftige Gattin ihm gegenüber die Rolle des Verführers zu spielen.

III. Auch ich halte die Befürchtung gegen die in allzu frühem Alter geschlossenen Ehen, die auch im UFG zum Ausdruck gebracht worden ist, für begründet und meine, daß die Frauen vom 21. Lebensjahr, die Männer vom 24. Lebensjahr unter Erkenntnis des ernsten Inhaltes der Ehe und mit entsprechendem Verantwortungsgefühl die Ehe eingehen. Zwischen diesem und dem 18. Lebensjahr ist für sie jene Orientierung und Unterstützung – natürlich in einer Form, die ihrem Alter

[18] KÖNIG: op. cit. p. 47.

entspricht – besonders nützlich, die die Minderjährigen, die heiraten wollen, von der Vormundschaftsbehörde erhalten, dies müßte aber auch eine Gelegenheit für die ernste Überlegung der Eheschließung sein.

Eine solche Gelegenheit der Überlegung wird im UFG § 3 Abs.(2) in Übereinstimmung mit § 9 der familienrechtlichen Richtlinien der Sowjetunion durch jene neue Bestimmung gegeben, wonach der Standesbeamte die Eheschließung nur für einen Zeitpunkt nach Ablauf eines 30tägigen Termins von dem Tage der Anmeldung dieser Absicht der Parteien anberaumen kann. Es wäre richtig, die durch die Verordnung des Ministers für Gesundheitswesen Nr. 5/1973.Eü.M., verbindlich gemachte Eheberatung institutionell auf diesen Zeitraum zu tempieren.

Im Einklang mit II. A. Punkt 1 des bevölkerungspolitischen Regierungsbeschlusses und mit dem Hauptziel der Familienpolitik ist die Beratung bezüglich des Familien- und Frauenschutzes seitens des beratenden Arztes auf die Fragen der Familienplanung und der Geburtenregelung eingestellt. (S. Verordnung § 4). Es könnte eine weitere Aufgabe der Beratung im Falle der beabsichtigten Ehe der Männer unter 24 Jahren und Frauen unter 21 Jahren sein, daß der Berater sich über den Ernst der Heiratsabsicht der Partner, über die voraussichtliche Festigkeit des beabsichtigten Ehebandes überzeugt und in gegebenem Falle die Möglichkeit hätte, die gesetzliche Wartezeit zu verlängern, die aber nicht drei Monate von der Anmeldung der Heiratsabsicht überschreiten sollte. Die Beratung würde also nicht zu einer Heiratsgenehmigung erhoben, könnte aber die Überlegung in erhöhtem Maß gewährleisten.

Dieselbe Lösung würde ich im Falle der nicht wegen ihres Alters beschränkt handlungsfähigen Personen im Falle ihrer Heirat empfehlen, wo eine gesonderte Beratung beider Parteien als richtig erscheint, weil die Ausnützung des Zustandes der beschränkten Handlungsfähigkeit einer Abwendung bedarf. Es sollte überlegt werden, die Heirat solcher Personen, wie bei den Minderjährigen, an die Genehmigung durch die Vormundschaftsbehörde zu binden.[19]

Die die Handlungsfähigkeit bloß einschränkende Entmündigung erfolgt nur bei einem geringen Teil der Personen im entsprechenden Gesundheitszustand durch Gerichtsbeschluß, deshalb spricht viel dafür, daß jene Personen, die allgemein bekannt in diesem Zustand sind, sowie z. B. die notorischen Alkoholiker und Rauschgiftsüchtige ebenso behandelt werden, wie die Entmündigten.

Als dritte Gruppe würde ich jene Personen ähnlich behandeln, die nach Scheidung zwei früherer Ehen sich zu einer dritten oder weiteren Ehe melden. Das steht im Gegensatz mit der Bestimmung der Verordnung des Ministers für Gesundheitswesen Nr. 5/1973.Eü.M. § 1, wonach die Personen über 35 Jahren, und jene,

[19] Daß dies im Gesetz von 1952 nicht erfolgt ist, schreibe ich der Tatsache zu, daß im alten Gesetz §§ 14 und 15 den entsprechenden Personenzustand nur als Eheverbot – ohne die Ungültigkeit der eventuell geschlossenen Ehe mit sich ziehend – kannte. Die verbotenen Ehen hat der zur Mitwirkung berufene Standesbeamte wirksam verhindert. Die Beseitigung solcher Eheverbote war aber ein allgemeines Ziel der Gesetzgeber von 1952.

die gelegentlich einer früheren Ehe an einer Beratung bereits teilgenommen haben, eben von der Teilnahme an einer wiederholten Beratung befreit werden. Ich hielte aber eine sorgfältigere Beratung und die Möglichkeit der Verschiebung der Eheschließung aus folgenden zwei Gründen in den genannten Fällen für erwünscht:

a) die Zahl der dritten und weiteren Ehen nimmt in der letzten Zeit bedeutend zu:

	1956	1969	1970	1972
Dritte Ehe des Mannes	802	1433	2050	1995
Weitere Ehe des Mannes	61	109	206	234
Dritte Ehe der Frau	535	955	1688	1656
Weitere Ehe der Frau	28	59	138	157

b) diese Bestimmung würde bloß 4% der Ehen berühren.

Es ist nicht zu bestreiten, daß allein die richtige Partnerwahl die wahren Grundlagen einer festen Ehe zu bilden vermag und wenn die Fälle, die auf deren Mangel hinweisen, mit größerer Sorgfalt behandelt werden, dies ein wichtiges Mittel der Familienpolitik werden kann.

Bevölkerungszunahme, Bevölkerungspolitik

I. Wenn die Verfassung der Ungarischen Volksrepublik in der neuen Struktur den Schutz der Ehe und der Familie in der Reihe der Deklarationen bezüglich des Aufbaus der sozialistischen Gesellschaft erwähnt, dies zeigt noch offensichtlicher, daß der sozialistische Staat von dieser Grundzelle der Gesellschaft den Nachwuchs der Bevölkerung, die Neuproduktion des Lebens erwartet, ohne das auch die übrigen Faktoren des Aufbaus des Staates nicht blühen können.

Das wird im ungarischen Familiengesetz nicht so eindeutig ausgedrückt, aber gemäß der Einleitung des sowjetrussischen Gesetzes wendet die sozialistische Gesellschaft die größte Aufmerksamkeit dem Schutz und der Förderung der Mutterschaft zu. Das Gesetz der DDR vom Jahre 1966 weist darauf hin, daß die bewußte Gestaltung des Familienlebens auch dessen Vermehrung durch das Kind bedeutet. Das wird in § 9 so ausgedrückt, daß „die eheliche Gemeinschaft ihre volle Entfaltung durch die Geburt und die Erziehung der Kinder erfährt und so ihre Erfüllung findet".

In den Mittelpunkt der ungarischen Familienpolitik trat jüngstens jenes schwere Problem, daß die Ehen in ihrer Gesamtheit nicht die gesellschaftliche Aufgabe erfüllen, durch Aufbau der einzelnen Ehen jene Bevölkerungszahl und jene Zusammensetzung nach Alter zu erreichen, die unter den gegebenen Umständen als wünschenswert erscheint.

Ich möchte nicht ausführlich auf die erfolgreiche, zwecks Verbesserung der Lage im Jahre 1967 eingeführte Maßnahme der Kindesfürsorgeunterstützung eingehen, deren Wirkung und Umfang der Inanspruchnahme bereits ausführlich bearbeitet wurde[20], und die der Regierungsbeschluß parallel mit der Einführung oder Erweiterung anderer Formen der Hilfeleistungen wesentlich weiterentwickelt hat.

Die Zahl der lebendigen Geburten stieg vom Tiefpunkt im Jahre 1962 mit 12,9/1000 Einwohner, im Jahre 1968 auf 15,1 an, aber weist von da an eine ständige Abnahme auf und betrug im Jahre 1970 14,7 im Jahre 1971 aber nur mehr 14,5.

Auch nur die wichtigsten der Anschauungen, die im Laufe der Jahre mit der Bevölkerungszunahme unzufrieden waren, zusammenzufassen, würde zu weit führen und das gehört auch nicht zu meiner Aufgabe.

Im allgemeinen möchte ich aber darauf hinweisen, daß die leitenden Faktoren des politischen Lebens ebenso wie die Schriftsteller und Publizisten, die die öffentliche Meinung am stärksten beeinflussen, jenen Wunsch betont haben, daß die Familien an der Neuproduktion des Lebens in einem solchen Maß teilnehmen, das den Erfordernissen der Zukunft entspricht.[21]

II. Meiner Ansicht nach dürfte die öffentliche Meinung nicht so gestaltet werden, daß die Familienplanung, die Entscheidung über die Geburt eines Kindes ein Recht ist, dessen Ausübung durch Zeugung eines Kindes zugleich irgendein schweres Opfer, ein außerordentliches Verdienst wäre, das auf den sozialistischen Staat materiell eine Verpflichtung aufbürdet, und daß dadurch das „Opfer" der Eltern, das sie aus eigenem Willen bringen, möglichst klein bleibe.

Ich habe das Recht der Familienplanung als ein besonderes Recht familienrechtlichen Charakters qualifiziert, das aber durch ein Gegenrecht der Gesellschaft gegenüber der Gesamtheit der Ehen belastet ist, nämlich die Gesellschaft mit entsprechendem Nachwuchs zu versorgen.[22] Dieses schematische Bild muß in Anlehnung an die Anschauung des großen Strafjuristen *Binding* und des großen Naturhistorikers *Einstein* damit ergänzt werden, daß die Vorbedingung des Geltendmachens der Pflichtseite ist, daß der Staat einerseits im Interesse der Betrauung, der Versorgung der durch die Ehen gelieferten nächsten Generation nach Möglichkeit alles tue.

Diese Bedingung kann aber nicht mit dem starren Erfordernis der Gleichwertigkeit der gegenseitigen Leistungen des Warenverkehrsrechtes gemessen werden, sondern mit einer Flexibilität des Familienrechtes, und die breitesten Schichten der

[20] *Gyermekgondozási segély* (Kindesfürsorgehilfe). A Népességtudományi Kutató Intézet Közleményei, 2/1970.

[21] Zur Aufrechterhaltung des jetzigen Bevölkerungsniveaus wäre eine Brutto-Geburtenziffer von 16‰ notwendig, ein perspektivischer Bevölkerungszuwachs von 5 % könnte durch Stabilisierung einer Geburtsziffer von 17‰ erreicht werden. Das erste Ziel wäre durch die Erhöhung der durchschnittlichen Kinderzahl der Ehen auf 2,16, das letztere durch eine Erhöhung auf 2,27 während einer ganzen Generation zu erreichen – SZABADY: *Világnépesedési problémák és a magyar helyzet* (Weltbevölkerungsprobleme und die Lage in Ungarn). Vortrag an der Ungarischen Akademie der Wissenschaften am 7. Mai 1974. (Zitat aus dem Manuskript.)

[22] NIZSALOVSZKY, E.: *A családtervezés joga és korlátai* (Recht und Schranken der Familienplanung). Magyar Tudomány, 1971. p. 285.

Bevölkerung sollen erkennen, daß die eventuellen Fehler und Mängel der staatlichen Fürsorge dadurch, was das Kind zum Inhalt des menschlichen Lebens hinzufügt, überbrückt, und reichlich ergänzt werden.

Laut Richtlinie Nr. 40580/1971 des Ministers für Gesundheitswesen kommt der Kampf gegen die Schwangerschaftsunterbrechung als Mittel der Familienplanung in der Zielsetzung der Tätigkeit der Beratung für Familien- und Frauenschutz sehr entschieden zum Ausdruck. Die Bedeutung und Aufgabenkreis dieser Beratung sind aufgrund des Regierungsbeschlusses Nr. 1040/1973 stark gestiegen. Die Beratungsstellen wurden im Jahre 1971 organisiert und sind seitdem tätig. Doch war die Beratung zusehr auf die Orientierung über die Empfängnisverhütungsmittel und deren Benützung konzentriert.

In diesem Zusammenhang berufe ich mich auf die meiner Ansicht nach sehr lehrreiche Feststellung von *Egon Szabady*: „Der Kampf gegen die Schwangerschaftsunterbrechung, die Einführung und die Verbreitung einer modernen und wirksamen Empfängnisverhütung mittels entsprechender Aufklärung ist notwendig, diese Arbeit muß aber mit der Propagierung der Familiengröße Hand in Hand gehen, die der die Entwicklung der Bevölkerungszahl sichernden Reproduktion entspricht.

Die unbeschränkte Zulassung der Schwangerschaftsunterbrechung mit dem Regierungsbeschluß Nr. 1047/1956 konnte nur durch die Verhütung der massenhaften Abtreibungen durch Quacksalberei begründet werden, die für die Frauen mit noch viel mehr Gefahren verbunden waren und nicht einmal die minimalsten Erfordernisse der Hygiene erfüllten. Diese Unbeschränktheit verursachte Sorgen infolge der unter ungarischen Verhältnissen allzu großen Zahl, die bereits mit unserer Familienpolitik im Gegensatz stand. Seit 1960 überstieg die Zahl der Schwangerschaftsunterbrechungen in jedem Jahr bedeutend die der lebendigen Geburten. Verhältnismäßig am wenigsten im Jahre 1960, als auf 100 lebendige Geburten 111 Schwangerschaftsunterbrechungen entfielen, am stärksten, als diese Zahl bereits 140 erreichte. Ich halte jene, von *Judit Kovács* mitgeteilte Angabe für erschreckend, wonach die Zahl der Schwangerschaftsunterbrechungen pro 1000 Frauen gleichen Alters von 1971 auf 1972 etwas abgenommen hat, aber die Abweichung zwischen den einzelnen Altersgruppen sehr groß ist. Die Abnahme beträgt in der Altersgruppe zwischen 20–29 Jahren 6, in der zwischen 30–39 Jahren 10, über 40 Jahren 4, dagegen nahm die Zahl der Schwangerschaftsunterbrechungen im Kreis der Frauen unter 19 Jahren um 17 zu.[23]

III. Hinsichtlich des abstrakten Maßes der Geburtenzahl und der Bevölkerungszunahme ist es nach vielen Autoren gleichgültig, ob die Geburten wegen Empfängnisverhütung oder wegen Schwangerschaftsunterbrechung ausgeblieben sind. Es ist aber vom Standpunkt der Frau nicht gleichgültig, die später einmal doch

[23] Magyar Nemzet, 1973, 22. April.

Mutter werden wollte. Es ist nicht darüber zu streiten, daß unter den Ursachen der Säuglingssterblichkeit und der Frühgeburten die früheren Schwangerschaftsunterbrechungen eine nicht zu vernachlässigende Rolle spielen.

Auch der psychischen Nachwirkung der Schwangerschaftsunterbrechung auf die Frau wurde keine entsprechende Aufmerksamkeit gewidmet. Ich könnte kaum annehmen, daß im Gewissen der Frau, die eine Schwangerschaftsunterbrechung ausführen läßt, keine Spur ihrer Tat zurückbliebe. Das ist vielleicht eine nie verratene Ursache von Depressionserscheinungen und des Kummers, und dieser Geisteszustand kann eine unermeßbare Wirkung auf die ganze Stimmung des Ehelebens ausüben. Wir wissen aus ausländischen Angaben,[24] daß solche Geistesleiden keine Seltenheit sind. Die Ausnützung dieses psychologischen Momentes als Präventivmittel wäre das Ziel jenes Kommissionsverfahrens gewesen, das in Ungarn der Durchführung der Schwangerschaftsunterbrechung verbindlich voranging. Es wurde aber daraus bloß eine die Frauen erniedrigende bürokratische Formalität.

Es kam vor, daß drakonische Maßnahmen eine plötzliche Zunahme der Geburtenzahl verursachten. Das erfolgte im Falle des französischen Gesetzes vom 31. Juli 1920 zwecks Ersatz der Verluste des ersten Weltkrieges, worin nicht nur die Schwangerschaftsunterbrechungen, sondern auch die Verbreitung der Empfängnisverhütungsmittel unter strenge Strafsanktion fielen.[25]

In der tatsächlich bedeutenden Zunahme der französischen Geburtenzahl spielten aber die sehr weitgreifenden Familienschutz- und Unterstützungsmaßnahmen eine bedeutende Rolle.

Auch sozialistische Staaten haben zur strengen Verfolgung der Schwangerschaftsunterbrechung zurückgegriffen, so z.B. Rumänien im Jahre 1966, wo infolgedessen die Zahl der lebendigen Geburten pro 1000 Einwohner im Jahre 1970 auf 21,1 angestiegen ist.

In Ungarn nahm der Ministerratsbeschluß Nr. 1004/1953 sehr scharf gegen die Vernachlässigung der Verfolgung der auch gemäß den geltenden Rechtsnormen strafbaren Abtreibungen Stellung. Demzufolge erhöhte sich der seit 1946 an sich schon steigende natürliche Bevölkerungszuwachs auf 12. Eine höhere Zahl als diese (13,1) ist seit 1881 nur im Durchschnitt der Jahre 1896–1900 vorgekommen.

Kálmán Kulcsár sah es sehr richtig, daß mangels an entsprechenden gesellschaftspolitischen, Kindesfürsorge- und Unterbringungsmaßnahmen, sowie unter den damaligen im Vergleich zu den heutigen noch sehr ungünstigen Wohnungsverhältnissen der erwähnte Ministerratsbeschluß Nr. 1004/1953 zu einer Steigerung der gesellschaftlichen Spannungen führte. Aber man muß *Kulcsár* auch darin zustimmen, daß die Lage deshalb unhaltbar wurde und zum entgegengesetzten Extrem führte, weil die Strafregeln in den Vordergrund traten und sich infolge des Mißver-

[24] LEACH, G.: *Medizin ohne Gewissen?* München, Zürich, Droemer Knaur, 1970. p. 45.
[25] SIMON, P.: *Le contrôle des naissances.* Histoire, philosophie, moral. Paris, Payot, 1966. p. 45.

ständnisses des Ministerratsbeschlusses in der Anwendung ein übertriebener Eifer zeigte.[26]

Wollen wir die Ergebnisse unseres wirtschaftlichen Fortschrittes nicht geringschätzen, so dürfen wir nicht außer Acht lassen, daß ein nicht unbedeutender Teil unserer Bevölkerung keine Wohnungssorgen mehr hat und auch sonst unter solchen Vermögens- und Einkommensverhältnissen ist, daß bezüglich der Familienplanung eine familienrechtliche Anschauungsweise, die alles vom Staat erwartet, seitens der Personen dieser Kategorie schon als ein Mißbrauch mit dem Recht zu betrachten ist.

Auf die Frage, was zur Verbesserung der Lage getan werden kann, gab der Regierungsbeschluß über die bevölkerungspolitischen Aufgaben Punkt II.B und die Verordnung des Ministers für Gesundheitswesen Nr. 4/1973.Eü.M. die vorläufig als endgültig zu betrachtende Antwort.

Eine wesentliche Änderung ist, daß die dazu berufene Kommission (in evidenten Fällen deren Arztvorsitzender) die Durchführung der Schwangerschaftsunterbrechung tatsächlich *genehmigt*, d. h. durch die Verweigerung der Genehmigung die Schwangerschaftsunterbrechung unter die unverändert geltenden Strafregeln fällt. Es gibt zwei Gruppen der Indikationen, die zur Genehmigung erforderlich sind. Die Feststellung der Fälle der ersten Gruppe führt zur Genehmigung (absolute Indikationen), in den Fällen der anderen Gruppe ist die Kommission ermächtigt abhängig von den übrigen Umständen des Falles die Genehmigung zu erteilen (relative Indikationen). In die erste Gruppe gehört vor allem die Begründetheit aus gesundheitlicher Hinsicht, wobei es abweichend von den anderen Fällen nicht gefordert wird, daß die Schwangerschaft 12 (bei Minderjährigen 18) Wochen nicht übersteige. Im erwähnten Anfangsabschnitt der Schwangerschaft gehören in diese Gruppe die außereheliche, weiterhin die infolge eines Deliktes eingetretene Schwangerschaft, der Wohnungsmangel, drei Geburten, oder neben zwei lebendigen Kindern ein gynäkologisches Ereignis, schließlich das Alter über 40 Jahre. Dieses Alter wurde durch die Rechtsregel bis zum 31. Dezember 1978 auf 35 Jahre herabgesetzt. Eine individuelle Beurteilung findet statt im Falle einer Mutter mit zwei Kindern, eines dauerhaften Militärdienstes des Mannes, der Freiheitsstrafe eines der Eheleuten. Der letzte Fall der zweiten Gruppe, der als Grundlage der Erteilung der Genehmigung dienen kann, ist, wenn in diesen Punkten nicht aufgenommene soziale Motive die Schwangerschaftsunterbrechung nachdrücklich unterstützen. Zwar konnte eine solche Möglichkeit der Überschreitung der übrigen Indikationsfälle nicht übergangen werden, wird sehr viel davon abhängen, wie die Praxis von diesem Mittel Gebrauch macht. Jedenfalls ist es von entscheidender Bedeutung, daß die Schwangerschaftsunterbrechung nicht mehr beliebig in Anspruch genommen werden kann, sondern ein an eine Genehmigung gebundenes letztes Mittel der Verhütung einer Geburt, an einen genau umgrenzten Kreis der Fälle beschränkt ist.

[26] KULCSÁR, K.: *A család helye és funkciója a modern társadalomban* (Stellung und Funktion der Familie in der modernen Gesellschaft). In Studiensammlung: Familie und Ehe in der heutigen ungarischen Gesellschaft, Budapest, Közgazdasági és Jogi Könyvkiadó, 1971. p. 40. Anm. 11.

Ein allzu früher Beginn des sexuellen Lebens ist ohne Zweifel nicht nur kein Erfordernis, sondern auch keine Begleiterscheinung des Aufbaus des Sozialismus, folglich spricht bei jungen Mädchen nichts gegen die sicherste Empfängnisverhütung: gegen die Enthaltsamkeit. Durch liebevolle, vernünftige Erziehung in Familie, Schule und in der Bewegung könnte auch auf diesem Gebiet ein Erfolg erzielt werden.[27]

Die Zahl der Schwangerschaftsunterbrechungen blieb im ersten Quartal des Jahres 1974 stark hinter der Zahl der entsprechenden Periode des vergangenen Jahres zurück. Im Zweiten Quartal dürfte man Ähnliches behaupten. Es wäre aber noch verfrüht, daraus auf eine ständig bleibende Änderung infolge der Gestaltung der wirtschaftlichen Lage oder infolge der gesetzlichen Maßnahmen zu schließen.

Arbeitende Frau in der Familie. Vermögensrechtliche Fragen

I. Aus dem Gesagten geht hervor, daß eine recht bedeutende Abnahme der Zahl der Schwangerschaftsunterbrechungen nicht unbedingt eine entsprechende Zunahme der Geburtenzahl nach sich zieht. Da hat die Einbeziehung der Frauen in die produktive Arbeit und in die staatliche und gesellschaftliche Aktivität als gleichberechtigte Partner in bedeutendem Maß ein Wort mitzureden. Eine kennzeichnende Aufgabe unserer Gesellschaft ist die Bestrebung, diese Erscheinung nicht nur nicht rückgängig zu machen, sondern im Gegenteil, weiterzuentwickeln.

Im Mittelpunkt der Widersprüche zwischen dem Bevölkerungszuwachs und der Rechtsstellung der Frauen steht also in Gestalt der arbeitenden Mutter. Die harmonische Lösung der Frage kann sich nur parallel zur allgemeinen wirtschaftlichen, ideologischen und kulturellen Entwicklung der Gesellschaft entfalten.[28]

In Ungarn war Ende 1972 von insgesamt 5 Millionen Werktätigen die Zahl der Männer 2 891 000, die der Frauen 2 170 000. Die Zahl der berufstätigen Frauen stieg vor allem im Kreis der Altersgruppe von 30–39 Jahren von 50% auf über 70%.[29] Schon von den im Jahre 1962 geschiedenen 17 308 Ehen war die Frau bloß in 5 063 Fällen nicht berufstätig und daher auf einen Unterhalt angewiesen.

Die Gleichberechtigung der arbeitenden Frau als Ehegatten ist in den Ehesachen entsprechend gesichert. Eine Ausnahme war die Frage der Weiterführung des Namens. Das Gericht mußte die Frau, die den Namen ihres Mannes führte, auf ihren Antrag im Scheidungsurteil besonders zur Weiterführung des Namens des Mannes ermächtigen. Diese Ermächtigung konnte auf Antrag des Mannes auch verweigert

[27] Man sollte öfters an Lenins wohlbekannte Worte an Clara Zetkin denken, laut denen die Befreiung der Liebe nicht neu, auch nicht kommunistisch sei. Die Unbeschränktheit des Geschlechtslebens sei eine bürgerliche Erscheinung, ein Zeichen des Niederganges. Das Proletariat sei aber – wie Lenin sagte – eine aufsteigende Klasse. In einer solchen Klasse sei die Selbstbeherrschung und die Selbstdisziplin keine Sklaverei, auch nicht in der Liebe. ZETKIN, C.: *Erinnerungen an Lenin.* Wien, Berlin, Verl. für Literatur u. Politik, 1929.

[28] Eine ähnliche Beleuchtung der Frage auch im Rahmen der kapitalistischen Gesellschaft s. KÖNIG: op. cit. p. 3.

[29] SZABADY: op. cit. p. 222.

werden, wenn das Gericht die Frau dafür „unwürdig" fand. Das war eine Diskrimination, die den Mann nicht treffen konnte.[30]

Das UFG § 20 eröffnete verschiedene Möglichkeiten für die Namensführungsformen, die die Frau bei der Eheschließung wählen kann. Abs.(3) anerkannte unter Beseitigung der genannten Diskrimination als allgemeine Regel das Recht der Frau zur Weiterführung des Namens, den sie während des Bestandes der Ehe geführt hat, wovon sie aus eigenem Willen abweichen kann, aber sie kann den Namen des gewesenen Mannes, wenn sie ihn während der Ehe nicht geführt hat, nicht aufnehmen. Laut Abs.(8) kann das Gericht die Weiterführung des Familiennamens des Mannes der Frau nur dann verbieten, wenn sie wegen eines absichtlich verübten Deliktes rechtskräftig zu einer Freiheitsstrafe verurteilt wird.

II. Bei einer anderen Gelegenheit habe ich schon darauf hingewiesen, daß eben in der Ehe von zwei Werktätigen von einer oder beiden Seiten der Wunsch auftauchen kann, über das Einkommen, das nach Deckung der Bedürfnisse des gemeinsamen Haushaltes zurückbleibt, frei und ausschließlich zu verfügen, das durch die gesetzlichen verbindlichen Vorschriften des ehelichen Güterrechts, durch die eheliche Gütergemeinschaft nicht gesichert ist, weil die Regeln die Erwerbsfähigkeit der Ehegatten in dem Maß einschränken, daß der Erwerb ein Element des gemeinsamen Vermögens wird.

Das UFG einbezieht die mit geistigen Schöpfungen verbundenen (dem Erfinder, Neuerer, Urheber zukommenden), während des Bestehens der Ehe erworbenen Rechte selbst nicht in die Gütergemeinschaft, sondern bloß die während des Bestehens der Lebensgemeinschaft fällig gewordenen Honorare (§ 27 Abs.[2]), und weist die zum persönlichen Gebrauch dienenden Vermögensgegenstände üblichen Maßes bzw. üblicher Menge ausdrücklich in das Sondervermögen des Gebrauchers. Dagegen bestimmt das Gesetz, daß die zum Sondervermögen gehörenden Vermögensgegenstände, die der täglichen gemeinsamen Lebensführung dienen, nach einem Zusammenleben von 15 Jahren Teil des gemeinsamen Vermögens werden. (§ 28 Abs.[1] Punkt c), Abs.[2]).Auch an der Ausnahme von der unbedingten Geltung der Vermögensgemeinschaft lockerte die neue Regelung in der Beziehung, daß dessen Aufhebung durch das Gericht während des Bestehens der Ehe nicht nur auf gemeinsamen Antrag der Eheleute, sondern auch auf einseitigen Antrag einer der Eheleute ermöglicht wird. (§ 31 Abs.[1]). Es gibt keine besondere Bestimmung für den Fall, wenn der als Grundlage der Aufhebung der Vermögensgemeinschaft dienende triftige Grund bereits bei der Eheschließung vorhanden ist.

Mit den mitgeteilten Bestimmungen ist die aufgeworfene Frage vorläufig als abgeschlossen zu betrachten. Ich bin aber der Meinung, daß die wirtschaftliche Entwicklung früher oder später notwendig machen wird freizugeben, daß die Eheleute ihre Vermögensordnung auf eine der tatsächlichen Lage entsprechende Weise

[30] Dessen Ursache war natürlich auch, daß der Mann aufgrund der Ehe nicht den Namen der Frau aufnehmen konnte.

regeln. Innerhalb oder außerhalb des Rahmens der diesbezüglichen Regelung sehe ich im Kreis der erworbenen Vermögensgegenstände die *Aufstellung einer solchen Kategorie für unvermeidlich, die hinsichtlich der Verfügung ausschließlich unter die Herrschaft der erwerbenden Partei fällt, aber nach Aufhören der Ehe sich doch an das aufzuteilende gemeinsame Vermögen anschließt.*

Je weitgehender in der ferneren Zukunft die vermögensrechtliche Unabhängigkeit der Eheleute zur Geltung kommt, desto mehr wird ihre gegenseitige, keine besondere Ermächtigung erfordernde Vertretungsmacht notwendig werden.

Wenn auch nicht nach dem Muster der *Schlüsselgewalt* der deutschen Frau, oder der *mandat domestique* der französischen, wird eine Bestimmung des Kreises der Geschäfte notwendig werden, in welchem vorgehend eine der Parteien nicht nur die Verantwortung der anderen mit dem Anteil an dem gemeinsamen Vermögen, sondern mit dem ganzen Vermögen verursachen kann. In der Praxis können sogar Fälle vorkommen, in welchen die handelnde Ehepartei entsprechend der Lage des wirklichen Vertreters außerhalb der Obligation bleibt.

Scheidung der Ehen

I. In Ungarn ist das dritte schwere Problem des Familienrechtes und eine am schärfsten gegen die Familienpolitik der Staatsleitung verstoßende Erscheinung die aus der folgenden Tabelle hervorgehende große Zahl der von den Gerichten geschiedenen Ehen.

	1949	1960	1965	1970	1971	1972	1973
Geschiedene Ehen	12556	16590	20263	22841	23560	24190	25300
je 1000 Einwohner	1,4	1,7	2,0	2,2	2,3	2,3	2,4
je 1000 neuen Ehen	116,5	187,3	227,2	236,8	250,1	247,6	249,1
je 1000 bestehende Ehen	5,8	6,5	7,7	8,4	8,6	8,8	9,2

Vergleichen wir diese Angaben noch damit, daß im Jahre 1938 nur 5754 Ehen geschieden wurden und so je 1000 Einwohner bloß 0,6 Scheidungen entfielen, so ist die Entwicklungstendenz als sehr ungünstig zu betrachten hinsichtlich einer Familienpolitik, die bestrebt ist, die Ehen zu festigen.

II. In den Vereinigten Staaten, wo der Prozentsatz der Scheidungen ähnlich dem ungarischen ist, tritt jene Anschauung besonders scharf in den Vordergrund, wonach solche Ehen, sogar in sehr hoher Zahl, geschieden werden, die sozial funktionsfähig wären und nur die Versäumung der Überbrückung durch entsprechende Mittel zeitweiliger, unbedeutender Zusammenstöße zwischen den Eheleuten zur Scheidung führt.

In der Studien-Sammlung von *Nester C. Kohut* unter dem Titel *Therapeutic Family Law*[31] teilt *Alice Rolls*, die während vier Jahren in 4 000 Scheidungsprozessen Vorsitzende der Gerichtskammer war, jene Überzeugung mit, daß mindestens die Hälfte jener, die einen Scheidungsprozeß einleiten, eigentlich hofft, daß noch etwas geschieht oder jemand noch eingreift, wodurch die Ehe noch ohne Scheidung in Ordnung kommt. Es ist tragisch, daß dieses erwartete Ereignis nicht eintrifft. *Mayer Elkin* teilt im Bericht über die siebenjährige Tätigkeit des außergerichtlichen Versöhnungsforums von Los Angeles mit, daß das Verhältnis der ohne Prozeß Versöhnten von 46% im Jahre 1956, auf 49% im Jahre 1959 und auf 60% im Jahre 1960 angestiegen ist.

Das Familienrecht einiger Volksdemokratien – so das Familiengesetz der Tschechoslowakei und der DDR – läßt den gesellschaftlichen Organisationen eine bedeutende Rolle beim Schutz der Festigkeit der Ehen zukommen.[32]

Meines Erachtens könnte vor Einleitung des Scheidungsprozesses, eventuell während des Prozesses die zur Zeit ausschließlich richterliche Funktion des Sühneversuchs mit einem entsprechend organisierten Gesellschaftsorgan für Familienschutz geteilt werden, es könnte eventuell ausschließlich damit betraut werden.

Laut der Verfahrensregel der Scheidungsprozesse (ZPO §§ 283–285) folgt dem ersten Verhandlungstermin ein Zeitintervall zur Förderung der Versöhnung, im Laufe dessen die zweite Hälfte der Verfahrensgebühr zu entrichten ist, damit der zweite Verhandlungstermin anberaumt werde, an dem dann die Scheidung erfolgen kann. Laut Mitteilung von *Jenő Bacsó* wird bei etwa ein Drittel der eingeleiteten Scheidungsprozesse die nach der ersten Verhandlung fällige Hälfte bis zur zweiten Verhandlung nicht entrichtet, d.h. es kommt auch nicht die Reihe an die Scheidung.[33]

Vielleicht könnte diese auffallende Verhältniszahl wesentlich erhöht werden, wenn ein Gesellschaftsorgan nach der ersten Verhandlung einschreiten und das tun würde, was die Eheleute nach *Alice Rolls* eben erwarten.

Rechtsschutz der Ehe und der Familie

I. Daraus, daß die Verfassung den Schutz des Instituts der Ehe und der Familie in den Schutzkreis der wesentlichen Grundlagen der Gesellschaftsordnung übertragen hat, folgt die Steigerung der Intensität dieses Schutzes als einer staatlichen Aufgabe. Es ist offensichtlich der Bedarf jener, die in einer der gesellschaftlichen Aufgabe entsprechenden Ehe leben, danach, daß die innere Harmonie ihres Familienlebens durch einen äußeren Angriff seitens dritter Personen nicht gestört wird, bzw. daß sie gegen solche Angriffe eines entsprechenden Schutzes zuteil werden.

[31] KOHUT, N.C.: *Therapeutic family law. – A complete guide to marital reconciliations.* Family Law Publications, Chicago, 1968.

[32] Tschechoslowakisches Ges. § 23; DDR Ges. § 1. Abs.(2).

[33] BACSÓ, J.: *A családjogi törvény módositásának vitája* (Diskussion über die Modifizierung des Familiengesetzes). Jogtudományi Közlöny, 3/1974. p. 74.

Das Recht der Ungestörtheit der Ehe und des Familienlebens, das gegen jeden geschützt ist, d. h. eine absolute Struktur hat, kann von der Gesetzgebung als ein besonderer Fall der Persönlichkeitsrechte mit einem besonderen familienrechtlichen Charakter anerkannt werden und auch in dem Sinn an einem Schutz teilhaben, indem die Verletzer als Sanktion auch mit einer Schadenersatzpflicht belastet werden können (Ung. ZGB. § 84 Abs.[2], § 339).

Die Naturrechtler des 17. und 18. Jahrhunderts befaßten sich in erster Reihe mit der Frage, inwiefern beim Ehebruch die dritte Person, in der sie natürlich den sahen, der die Ehe am schwersten verletzte, denn dadurch wurde die Abstammung des „sicheren Erben" zweifelhaft, verpflichtet ist dem betrogenen Manne einen Schadenersatz zu zahlen.[34]

Neben dem Großteil der Staaten der Vereinigten Staaten sorgten auch England, Frankreich, Italien und die Schweiz über die Sanktion der „Ehestörung" in irgendeiner Form, deren Abweichung in den Details ein interessanter Gegenstand der vergleichenden Rechtswissenschaft sein könnte, worauf wir aber hier nicht eingehen können.

Laut einer Mitteilung von *Jayme* verursachte in der BRD die Divergenz der Stellungnahmen in der Literatur einen Bruch zwischen der negativen Praxis der höheren Gerichte und jenen Entscheidungen der niederen Gerichte, die in den Sachen, die nicht vor die höheren Gerichte gelangen, zum Nachteil des Ehebrechers entstanden sind.

In der ungarischen Rechtspraxis entstand in mehreren Fällen eine Entscheidung gemäß der von zuständiger Stelle erhaltenen Informationen, wonach derjenige, dessen Vaterschaft vom Gericht festgestellt wurde, zum Ersatz der Unterhaltskosten demgegenüber, der bisher für das Kind gesorgt hat, verpflichtet wurde. Dieser frühere Unterhaltende ist natürlich oft derjenige, der aufgrund der auf ihn hinweisenden Vaterschaftsvermutung den Unterhalt solange leisten mußte, bis die Vermutung aufgrund seiner Klage vom Gericht nicht entkräftet wurde. In einem solchen Fall kann beim Geltendmachen der Forderung kaum das Familiengesetz § 68 Schwierigkeiten verursachen, weil eine Unterhaltsforderung gemäß dieser Bestimmung auch für einen Zeitraum über 6 Monate nachträglich geltend gemacht werden kann, wenn dem Berechtigten beim Geltendmachen der Ersatzforderung kein Versäumnis zur Last fällt. Der früher vermutete Vater kann im Geltendmachen der Ersatzforderung solange nicht als Versäumender angesehen werden, bis der natürliche Vater des Kindes nicht festgestellt ist. Der aufgrund der Vaterschaftsvermutung Unterhaltende ist solange nicht dessen bewußt, daß er eine fremde Verpflichtung erfüllt, bis er sich über die Unrichtigkeit der Vermutung nicht überzeugt. Ich meine, die Grundfrage ist die, ob die Rechtsnorm einen solchen Ersatzanspruch anerkennen soll. Wenn sie es aber tut, so müßte das *Familienrecht dafür eine selb-*

[34] JAYME, E.: *Die Familie im Recht der unerlaubten Handlungen.* Frankfurt a. M., Berlin, Metzner, 1971. II. Teil, 6. Kap. p. 223 man et seg.

ständige Rechtsgrundlage liefern und nicht in der Reihe der zivilrechtlichen Klagen den Weg der Lösung durch Analogien offenhalten.

Auch hinsichtlich des Volumens des fraglichen Ersatzanspruchs ist es jedenfalls von Bedeutung, daß die Anfechtung der Vaterschaftsvermutung einen Termin von bloß einem Jahr von der Kenntnisnahme der Ursache der Anfechtung hat, wonach der vermutete Vater in dieser seiner Rechtsqualität – wenn ihn das Kind selbst nicht davon enthebt – bestehen bleibt. Daran änderte jene neue Bestimmung, wonach nach Ablauf des genannten Termins – im Interesse des vermuteten Vaters – der Staatsanwalt die Vermutung noch immer anfechten kann. (UFG § 43 Abs.[6]).

Die Wiederherstellung der Sanktion des Ehebruchs, die nach der Befreiung abgeschafft wurde, oder dessen Qualifikation z. B. als schwere Verletzung der Persönlichkeitsrechte familienrechtlichen Charakters, könnte kaum mit Aussicht auf Erfolg vorgeschlagen werden. Dessen gerichtliche Feststellung erfolgt im Laufe des Scheidungsprozesses. Es zeigte sich bei der Untersuchung der Scheidungsgründe, daß es in 31 % der Scheidungsfälle im Jahre 1965 tatsächlich als Begründung des Scheidungsantrages aufgenommen war.[35]

II. Für den Schutz gegen die Störung der inneren Ordnung des Familienlebens scheinen statt Gesetzgebungsmittel eher die gesellschaftlichen Mittel geeignet zu sein, wenn sie keinen Vermögensschaden verursachen. Im Falle eines Vermögensschadens leistet dagegen das Ung. ZGB. § 85 Abs. (2) Hilfe, wonach im Falle der Verletzung eines mit der Persönlichkeit verbundenen Rechtes, die einen materiellen Schaden verursacht, gemäß der zivilrechtlichen Verantwortung ein Schadenersatz zukommt, dessen Hauptregel in § 339 enthalten ist.

Die Feststellung der die Harmonie der Ehe von außen her störenden Verhalten und ihrer sich an die Atmosphäre des Familienrechtes anpassenden Sanktion ist natürlich keine einfache Aufgabe, aber manche Bestimmungen des StGB geben eine gewisse Wegweisung, die nur die schwersten Fälle jener gesellschaftsgefährlichen Verhaltensweisen mit Strafe bedrohen, die geeignet sind, die innere Ordnung der Familie zu stören.

Neben den Sanktionen mit besonderem familienrechtlichem Charakter innerhalb des Rechtszweiges wäre die Anwendung von Sanktionen der Übertretungen gegebenenfalls gemäß Ges. I 1968, § 17 in Form einer Geldbuße zu überlegen. Die Anwendung der vom Gesetz gebotenen Möglichkeit des Freiheitsentzuges würde übers Ziel hinausschießen, aber die Handlungen, die die Familienordnung stören, bekämen mit Recht einen Platz in der Regierungsverordnung über die Übertretungen.

Solche Sachen könnten in erster Linie vor ein Gesellschaftsorgan für Familienschutz gebracht werden, in dessen Zuständigkeit die Warnung gehören könnte, wenn es dies für zweckmäßig erachtet; wenn aber nicht, wäre es berufen laut § 42 des

[35] *A válások okai* (Ursachen der Scheidungen). A Népességtudományi Kutató Csoport Közleményei, 2/1965. p. 30–31.

Gesetzes die Anzeige erstatten. Allein das Bestehen einer solchen Regelung und ihre Gemeinkundigkeit könnte an sich schon eine erzieherische und vorbeugende Wirkung haben.

Landesorganisation des allgemeinen Familienschutzes

Wir dürfen ohne Zweifel darauf hinweisen, daß alle gesellschaftlichen Organisationen, die sich mit den Angelegenheiten der Familie befassen, weitgehend fertigstehen, die Aufgaben der Familienberatung und des Familienschutzes zu erfüllen und zu diesem Zweck die zur Verfügung stehenden Kräfte zu vereinen.

Ich bin überzeugt, daß es unvermeidlich ist eine solche Organisation aufzustellen, die mit ihrer Tätigkeit bis in die kleinsten Siedlungen der Bevölkerung einzudringen vermag und doch in ihrer Tätigkeit zur Erfüllung der Aufgaben einer zentralen Leitung und der Mittel der möglichst intensiven Fachbildung der unmittelbaren Mitarbeiter nicht entbehrt.

Die Hoffnung der Verwirklichung einer solchen Organisation steht hinter meinen Vorschlägen, die einer späteren Entwicklung dienen sollen.

Es ist vielleicht nicht notwendig zu betonen, daß meine Bemerkungen nicht den Zweck hatten, einer Unzufriedenheit mit den geltenden Normen des Familienrechtes Ausdruck zu geben. Ich wollte nur untersuchen, ob wir durch noch ungewohnte Mittel auf diesem Gebiete auch weiterkommen könnten.

Und ich hoffe, es ist mir durch das Gesagte gelungen im Leser den Eindruck zu erwecken, daß die auch bisher wohlwirkende Gesetzgebung die Grenzen jener Möglichkeiten noch nicht erreicht hat, mit denen sie der Familienpolitik, im allgemeinen dem organischen Einbau der Ehe und Familie in die neue Gesellschaftsordnung dienen kann.

Les moyens législatifs de la politique de la famille

par

E. Nizsalovszky

Le nombre élevé des mariages dissolus, la proportion très basse des naissances ainsi que le nombre croissant des interruptions légalisées de grossesse ont attiré en Hongrie dans les dernières années l'attention du gouvernement et de la société à l'institution du mariage et à celle de la famille. Cette circonstance avait pour conséquence que sur la base de la Constitution de 1973 et en vertu d'un décret du gouvernement concernant la politique de population d'une grande envergure ainsi que dans les cadres de la révision du Code de 1952 sur la famille des dispositions très importantes ont été prises dans le domaine de la politique de la famille. L'étude ne considère pas définitif le domaine des mesures désirables pour servir aux objectifs de la politique de la famille. Après avoir éclairci certaines questions fondamentales elle cherche – en dehors des moyens déjà employés par la législation – à en démontrer certains encore qui pourraient être utilisés en la matière. Après l'analyse des notions de la famille et du mariage et après avoir inséré le droit de la famille dans une branche séparée du droit l'auteur propose qu'il faudrait, pour éviter autant que possible les mariages ne promettant aucune stabilité, introduire un délai obligatoire de raisonnement. Il

apprécie ensuite l'exigence – en partie déjà réalisée – que les avortements chirurgicaux soient liés à des conditions spéciales. L'étude cherche à trouver des solutions appropriées pour établir l'harmonie entre la maternité et la situation patrimoniale de la femme gagnant sa vie et les conditions économiques actuelles ainsi que pour sauver, par des moyens sociaux, les mariages viables dont la dissolution est déjà entamée devant le tribunal. Ensuite l'étude examine les moyens aptes à défendre l'ordre intérieur des mariages contre toute attaque venant de l'extérieur (adultère, autres actes contrariants). Enfin l'auteur propose de créer un organe destiné à remplir dans tout le pays les tâches différentes – concernant la protection de la famille.

Средства правотворчества в области семейной политики

Э. НИЖАЛОВСКИ

В последние годы число расторженных браков и легализированных искусственных прерываний беременности увеличилось, а рождаемость была низкой. Всё это привлекло внимание венгерского правительства и общества к институту брака и семьи. Согласно широкому решению правительства по демографической политике и в рамках ревизии закона от 1952 о браке и семье значительные меры были приняты в области семейной политики. Автор статьи не считает законченным круг желаемых мер, служащих интересам семейной политики. После выяснения некоторых основных вопросов ищет дальнейших средств правотворчества. После анализа понятий брака и семьи и отделения семейного права, как отрасли права, в интересах уменьшения числа нежизнеспособных браков, автор предлагает проведение вынужденного срока обдумывания. Оценивает более строгие условия искусственных прерываний беременности и разрешение в соответствии с экономическим положением положения трудящейся женщины в период беременности и после рода, а также её имущественного положения в семье. Автор пытается обрисовать способы спасения общественным воздействием жизнеспособных браков, которые уже переданы в суд с целью расторжения. Рассматриваются возможные средства защиты внутреннего порядка брака от внешних отрицательных влияний (нарушение брака и другие мешающие обстоятельства). Наконец, автор предлагает создание общегосударственной организации, призванной к решению различных задач в области охраны семьи.

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Problems of Self-Government in the Councils of Hungary

by

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With the turn to the 20th century, the idea of Self-Government lost its original meaning in Britain and the bourgeois states of the Western World, and this meant a big change as compared to the state-shaping principles of early liberalism. The Soviet state organization came into being as a result of the revolutional grasp of power by the local forces. Nevertheless, these forces fought against the incoherent anarchistic formations from the very beginning and created "state power" from the Soviets that had a "Self-Government" character. Subsequently, the concept of Self-Government disappeared from political documents. It was in the 1950-'s that the problem of Socialist Self-Government was mentioned again. The local and regional organs are mentioned in the Bulgarian Constitution of 1971 and in a Polish Act on National Councils, amended in 1972, as popular bodies of Self-Government. In Hungary, the Self-Government character has been mentioned since 1971 with a view to emphasize the continuously increasing and developing independence and autonomous activity of the Councils. One of the most important legal component of Self-Government competences in Hungary has been the elaboration of decrees, in general, and the establishment of the organizational and functional statutes of the Councils, in particular. In the said statutes the earlier own practice of the Councils was codified; besides, they gave birth to several modern experiments. On the other hand, the economic independence of the Councils was facilitated since 1971, especially by guaranteeing available revenues for them. The development of the national economy must not be obstructed, however, by this policy, and economic disintegration is inadmissible. The Councils become then real centres of organization and co-ordination.

I

It has been an uneasy task to deal with the problems of Self-Government, since the concept of "Self-Government" took as much shapes in the course of history as it was required by changes of political power. Nothing has been more characteristic for this than the fact that, when facing the problem of the definition of the concept, a confusion has been encountered even in the literature of the English-speaking countries i. e. those from which the original term *"Self-Government"*, used in this form in numerous other countries as well, originated. In a political dictionary, published in the US some years ago[1], as much as 20 historical definitions are enumerated, without getting nearer to the general term of the concept. It is characteristic for the way of this approach, however, that definitions dating to the mid-nineteenth century are given according to which "contrary to a great deal of views, the execution of Self-Gov-

[1] SPERBER, H. – TRITTSCHUH, T.: *Dictionary of American political terms.* New York – Toronto – London, 1964. pp. 396–398.

ernment power is not of a revolutional but of a strictly conservative character, destined to preserve the existence of the society and the relations to the native country."[2]

As for the socialist countries, most authors dealing with this problem and left with the lack of the definition of the substantive part of the concept, tried to give a definition of Self-Government, setting it against centralism or deconcentrated organization, respectively.

When giving a classification of the local administrative organs of the bourgeois state, Professor I. Kovács mentions two types of Self-Government, i.e. corporate or regional Self-Government, on the one hand, and deconcentrated organizations, on the other hand. As for the latter group, "a general feature characteristic for it, i.e. the qualification of the organizations concerned as being transferred bodies of the central administrative organs, on the basis of their legal position, is reflected in an explicit way already by their denomination". Besides, "their subordinate character is manifest in any concrete matter as well". Self-Government is set against this way of organizational form. The following comments are restricted, however, to the regional forms of Self-Government. As Professor Kovács states, "regional Self-Government bodies are called the organs formed by the citizens of a given region, having the right of voting, with the specific purpose to comply with state functions appearing at local level".[3] A similar method was used by Professor J. Beér who regarded the deconcentrated administrative organs as "transferred" bodies of the central administrative organs, linked to each other by "hierarchical subordination", with the right of instructions on the one hand, and unconditional submission, on the other hand. Contrary to this relationship, regional Self-Government bodies "are granted some degree of autonomy according to the bourgeois concept". Reference is made to the way of their coming into being (they are elected by citizens having suffrage) "first and foremost to carry out state functions appearing at a definitely local level ..., to their subjection to the inspection of the central organs, in relation to which they enjoy, however, some degree of independence, and possess legal entity".[4] In a footnote of his precited work, Prof. Beér drew attention to the different natures of the role of some Self-Government bodies.

This problem was not investigated, however, with a due thoroughness, both in the Hungarian and the recently published socialist literature. The cause of the retrograde features, established in the content of Self-Government was attributed solely to the unequal development that became critical in the imperialist era. Nevertheless, it should be noted that the differences in question existed in the legislation and the state practice of the various countries as long as since the Middle Ages, and with the

[2] Op. cit. p. 397.

[3] BEÉR – KOVÁCS – SZAMEL: *Magyar államjog* (Hungarian constitutional law). Budapest, 1960. p. 356.

[4] BEÉR, J.: *A helyi tanácsok kialakulása és fejlődése Magyarországon 1945–1960* (Formation and development of the local councils in Hungary 1945 to 1960.). Budapest, 1962. p. 12.

beginning of the bourgeois revolutions in particular. The traditions left to posterity by the centralized French monarchy at the end of the feudal era differed substantially from those transmitted by the Medieval British State. Although the villages were mentioned as "small municipal states" by the publicists of the French bourgeoisie over some years of the revolutionary era and, besides, in the wording of the Act of December 14th, 1789, municipal power exerted by own right was mentioned beside the jurisdiction delegated by the central executive power, the French bourgeoisie discontinued its attachment to this idea in a short time. The establishment of the Napoleonistic bureaucracy, the prefectural system, and the intensive control of the local organs left no way to set up a "municipal power". Besides, it is a characteristic fact that, originally, there was no French equivalent to the concept of Self-Government, and always this English expression has been used if a Self-Government of the British type was concerned. (It should be noted that the term "autogestion" is of recent origin and its meaning is not adequate to that of Self-Government.) The strengthening of the idea of Self-Government in Britain was a process that lasted over centuries, and it was aimed at the protection of the not yet unified interests of the bourgeoisie which were, however, existing and emphatically expressed in the cities and major villages. All this formed an almost unchanged line till the second half of the 19th century. Then matters affecting public health were passed to the jurisdiction of local Self-Government bodies. This transfer of competence resulted, however, in the transfer of substantial financial costs to the villages and cities. In consequence of the fact that the expenses concerned could not be compensated with the own earlier revenues i. e. local taxes, the support from central funds had to be increased. Thus the local Self-Government bodies were released from these burdens by transferring for them part of the national tax revenues or allocating them given sums, respectively. Although even later there were no government officers in Britain of the kind as the prefects in France, of a "transferred" character, vested with a checking or government inspection power, the central organs continued to reserve for themselves the checking of the utilization of supports from central funds. Considering, furthermore, that it has been very difficult to separate the financial support granted by the State from financing from own resources (by means of Self-Government), the checking in question covers essentially almost the entire field of the mechanism of Self-Government. The *extension of powers* in this field facilitated thus *centralization* instead of favouring decentralization.

The unquestionable truth of the above argumentation is proved by the following statements of Ivor Jennings, one of the most remarkable figures in Britain in this century in the field of constitutional law. The citations are taken from his work published in German. "In unserem Jahrhundert hat ... das Anwachsen der Funktionen des Staates das Gleichgewicht zwischen zentraler und örtlicher Regierungsgewalt verschoben. Die großen Entwicklungen im 19. Jahrhundert – öffentliches Gesundheitswesen, Überlandstraßen, Erziehung, Polizei, Feuerwehren, Landwirtschaft, öffentliche Versorgungsbetriebe (public utilities) und noch andere – lagen vor allem

im Gebiet der örtlichen Selbstverwaltung. Im gegenwärtigen Jahrhundert haben nicht nur die Ministerien mit lokalen Aufgaben ihre Macht erweitert, sondern es sind auch neue zentrale öffentliche Dienste, wie vor allem die öffentliche Sozialunterstützung, die staatliche Sozialversicherung und der nationale Gesundheitsdienst geschaffen worden. Außerdem ist die Zuständigkeit für die wichtigsten Hauptverkehrsstraßen, einige Zweige des öffentlichen Gesundheitswesens, das Armenrecht (das Poor Law, das als solches jetzt verschwunden ist), die öffentlichen Versorgungsbetriebe (die meist nationalisiert worden sind) von der lokalen auf die zentrale Regierung übertragen worden. Diese Entwicklung ist seit 1950 schnell fortgeschritten. Nicht nur relativ, sondern auch absolut gesehen hat die Bedeutung der örtlichen Verwaltungstätigkeit abgenommen."[5]

The course of development referred to above, i.e. the effect of the Napoleon-established centralization on regional and local public administration in France, furthermore the increasing volume of public functions with subsequent centralization and central inspection, is of interest for, essentially, it was a product of two fundamentally different periods of the Bourgeois State. It has to be added to the precedings, however, that the process of centralization in France did not come to an end at the beginning of the 19th century. As soon as economic conditions changed, i. e. economic integration and co-operation became imperative for continuously growing areas, the competences of communal and departmental public administration were being raised to increasingly higher levels. This effort, doubtless of a centralizing character, formed the basis of General de Gaulle's last experiment of government.

Finally, it has to be made clear that the idea of Self-Government lost its original meaning till the dawn of the 20th century not only in Britain and France but almost in the whole Capitalistic World. Without giving a pejorative emphasis to the above statement, the said general trend has to be regarded as a remarkable breakdown of the principles of state-shaping of the early liberal-bourgeois era.

II

The construction of the organization of the Socialist State in Russia was a process upwards from below, i.e. a phenomenon unknown in history up to that time. Thus the local and regional organs were created by election from the very beginning, as democratic bodies of the working class and the peasantry, i.e. the majority of the population. Actually, it was this way that the dream of the revolutionary democrats of the bourgeoisie, a local organization based on genuinely democratic fundamental principles, possessing necessarily its own powers and, what is more, powers with very wide competences, became reality. This was natural as it was functioning as a consequence of the revolutionary grasp of power of the local forces and in the spirit

[5] JENNINGS, I.W.: *Das britische Regierungssystem.* Köln-Opladen, 1958. p. 51.

emanating from it. Nevertheless, two complementary remarks should be made to this point:

a) Immediately upon the seizure of power, the bolsheviks envisaged the formation of the *entire Soviet State*, instead of thinking of some sort of a disintegrating, anarchaistic formation. Among other factors, this was the cause that, just complying with Lenin's efforts, the view was accepted in the last phase of the elaboration of the Soviet Russian Constitution of 1918 according to which the constitutional organization of the State should have been formed in the fundamental Act as based on the priority of the supreme organs instead of the local bodies. It was clear from the criticism with which Lenin regarded anarchistic and confederative concepts in later years that, already in the first phase of the construction of the State, the bolsheviks opposed definitely to sacrifice the unity of politics and economy in favour of abstract and already anachronistic "federalizing" tendencies. In an earlier work, I made already reference to the fact that the resolution on "*The absolute powers of the Soviets*" dated November 8, 1917, was one of the first decrees of the Soviet State. Particular as it was, the rather unequivocal title covered a content of a completely different nature, as it was the said decree by virtue of which the central governing of the local organs was established.[6] All this did not mean, of course, as if the bolsheviks, being firmly on the fundamental basis of democratic centralism, had failed to emphasize the importance of socialist democratism. Essentially, the elasticity of Soviet power was due to the fact that a real "state power" was created from the Soviets with a "Self-Government" character, and the democratic features of this power were confirmed again and again.

b) The various elements and more definite features of *Planned Economy* appeared in the economics of the Soviet State at a relatively very early moment. In spite of the fact that the local Soviets and the plants concerned were duly invited to participate in the preparation and execution of the plans, the intensive centralism of planning and its adequate effect in other fields presented themselves in a manifest way in this period. Irrespective of the actual plan concerned, i.e. the GOELRO, the Five Year Plan or any early phase of planning in a given case, the plans proper made imperative the concentration of the efforts of the whole national economy. Of course, any kind of a doctrinaire, vague local autonomy or Self-Government was out of question this way. Conformity to the plans and, consequently, a rational centralization of competences, with simultaneous rights of the workers and peasants in the state organization, unknown earlier; the functioning of the Soviet organization was delimitated by the two said tendencies. In view of this, it might not be an excessively bold conclusion to state that Lenin's slogan of communism regarding it as Soviet power plus electrification of the whole country did not mean, among other factors, only the possession of power and the raising of Russia's technical level but

[6] BIHARI, O.: *A szocialista államszervezet alkotmányos modelljei* (Constitutional patterns of the socialist state organization). 1969. p. 257.

also the formation of the socialist democratism of the working masses, parallel to the establishment of planning on national scale, i.e. with the simultaneous securing of the central forces of the economy. It has been characteristic for the socialist development that the simultaneous appearance of the two tendencies was emphasized in the relevant party and state documents. Thus neither the historical role of economic planning nor the necessary autonomy of the local organs in the administration of local affaires was taken out of consideration. It was this reason for which the term "Self-Government" was frequently used in the wording of the resolutions of the party in connection with the local Soviets in the course of the first years of Soviet power, if only for the sole purpose to emphasize that the Soviet organization was not a simple negation of earlier forms of organization but it was a building of the State carried out at a higher level, purported to use and develop all real achievements of progressive thinking. Accordingly, it was declared by the 8th Congress of the Russian Communist (Bolshevik) Party, held in March, 1919, in relation to the programme of the party: "... in particular, the proletarian or soviet democracy made just the mass organizations of the classes suppressed by capitalism i.e. proletarians and semi-proletarian poor peasants, forming the overwhelming majority of the population, the permanent and only basis of the state organization, from the lowest to the supreme instances. Thus the Soviet State made a reality from *local and regional Self-Government*, in an uncomparably wider range than anywhere, without having nominated any authority from above."[7]

The term "Self-Government" disappeared later from the political documents, in compliance with the course of development in which the individual features of the Soviet system, realizing democratic centralism, became known to the population. The "state power" character of the Soviet organs at any instance was emphasized vigorously after the enactment of the 1936 Constitution in particular. An other specific expression, presenting the Soviets as organs of the masses and purported to accentuate the democratism of the Soviets, came into general use as well. (This expression was translated, however, as "mass organizations" giving thus birth to frequent misunderstandings, for the councils, as mass organizations, were never regarded to be so as other organizations of similar nature which, however, had put stricter rules for their membership and were functioning in a way adjusted to this structure.) True, recent legislature outdid already the said term i.e. the district, city, and city district Soviets are denominated merely as organs of the state power by two law-decrees of March 19, 1971, just as by the model statutes. Their links with the masses have been expressed by circumscribing and defining precisely their fields of activity instead of using an attribute of general character.

[7] Коммунистическая партия Советского Союза в резолюцях и решениях сьездов конференции и пленумов. Ц. К. (Resolutions of the Congresses, Conferences, and Plenary Sessions of the Central Committee of the Communist Party of the Soviet Union.) Moscow, 1953. Part II. p. 413. (Author's italics). It should be noted that the term "regional" is used in the Russian original as "oblastnoe" instead of "territorialnoe", making thus clear that the Self-Government of the administrative units "oblast" is concerned.

III

The problem of Socialist Self-Government was raised again in the 1950'-es. It should be noted to this point that, as for the relevant literature published in Hungarian, the term "Self-Government" was substituted by the term "Self-Administration" several times, although both the Russian expression "samoupravlenie" and the adequate expression in Serbo-Croatian represent the concept expressed in Hungarian by "Self-Government". This was the reason for which the debate concerning the idea of Self-Government, held in those years, got a rather misleading sense from the part of some Hungarian authors.

The Jugoslav concept Self-Government developed as a comprehensive principle of organization of the State, consequently it cannot be related to the complex of problems dealt with in the present study.

Two socialist constitutions were enacted in recent years in which the problems treated here are touched upon in some way, i.e. the Constitution of the German Democratic Republic of 1968 and the Bulgarian Constitution of 1971. As for the first, no mention is made of any matter of Self-Government. On the contrary, the autonomistic illusions in bourgeois states are vigorously criticized in the comments to Article 81. As it is put down in the commentary, "...there is no sense to hold a debate in the socialist society on more or less "Self-Government..."[8] At the same time, several institutions are regulated in the Constitution which include the features referred to above. It is thus put down that a) "the local organs of popular representation are state power organs elected by the citizens having the right of voting..." (Article 81, paragraph 1.); b) "the local organs of popular representation take decisions on matters affecting their region and populace within their own competence, by virtue of the relevant laws" (Article 81, paragraph 2.); c) "the decisions thus taken have a compulsory power on their organs and institutions as well as in relation to the organs of popular representation, the communities, and the citizens of the areas concerned." (Article 82, paragraph 1.); d) "the local organs of popular representation have their own revenues and they dispose of their utilization" (Article 82, paragraph 2.); e) "the organs of popular representation, elected by the citizens, have powers to realize the social functions of the cities and villages", and the same organs "are responsible for the reasonable utilization of all goods of people's ownership they dispose of" (Article 43, paragraph 2.). The substantial elements of all what was stated above in respect of the idea of Self-Government, put in the conditions of the socialist state, are enumerated in the Constitution although, as it has been evidenced by the relevant comments, Self-Government as an approach and an institution "without subject-matter" has been rejected by the science of constitutional law.

[8] *Verfassung der Deutschen Demokratischen Republik* – Dokumente. Kommentar, Berlin, 1969. Vol. II. p. 370.

The People's Councils are mentioned already as organs of the state power and the *People's Self-Government* in Chapter VII, Article 110 of the Bulgarian Constitution of 1971. Clearly, there was no reluctance whatever in this case against the use of the term "Self-Government". The above mentioned definition, of general character, is completed, however, in Article 114 of the Constitution, putting down clearly delimitated targets for the People's Councils, including the direction of the economic development of their region as well as of the development work carried out there in the field of social welfare, public health, communal services, culture and education, elaboration and adoption of an own social and economic development scheme and budget, the organization and inspection of the realization thereof, and the direction, co-ordination, and control of the activity of the institutions functioning in the areas within their competence. All of the functions mentioned in the precedings, carried out under Article 2 of the Constitution "by way of freely elected representative organs", are emphasized as Self-Government Functions in the said Constitution. (This was regarded as the basis of Self-Government already in the bourgeois political literature, without having defined, however, the electoral system in a democratic way.)

It should be mentioned finally that paragraph 1. of Article 65/a of the Act on the National Councils was amended by the Sejm (Parliament) of the Polish People's Republic on November 29, 1972, qualifying the National Councils of villages with a more extended jurisdiction not only as organs of the state power but "fundamental organs of social Self-Government" as well. (Note that the Constitution proper was also amended at the same time.)

IV

The definitions given for the characteristics of the councils in the years 1950 and 1954 as well as the scientific comments connected to them have been criticized in the Hungarian legal and political literature for some years. First, attention was drawn to the meaningless classification of the so-called state power nature of the councils, as all state organs with a jurisdiction to carry our any sort of power are naturally "state power" organs. Later, the concept thrusting forward the mass organization character of the councils was criticized. Although the councils are really organizations constituted by the masses of citizens, it is not permissible to place them at the level of the other mass organizations.

It is beyond the scope of this study to deal with the characteristics of the councils in respect of people's representation and public administration. Nevertheless, the ways and the causes of the formation of the concept of Self-Government, first in the new Act on the councils and then in the reform of the Constitution, are worth to be treated in a more detailed form.

The question whether the Self-Government character of the councils, not mentioned long since, can be mentioned and discussed at all, was first put by S. Lakos in

the Hungarian political literature.[9] Essentially, he set forth the following views: a) the reluctance and fear to recognize the rightfulness of Self-Government are unjustified; b) the most important feature of Self-Government is a higher degree of local autonomy; c) one of the guarantees of this autonomy is the gradual enforcement of the principle of self-financing; d) the councils, as organs with Self-Government, cannot be directed centrally but the general supervision of their activity, observing the requirements of the rule of law, has to be established. The study in question contains detailed proposals aiming at new solutions to problems of the councils in the field of Economic Self-Government, culture, public health, and social services.

As a matter of fact, lengthy disputes were taking place concerning the definition of the character of the councils in the course of the drafting of the new Act on the councils. The disputed nature of the "state power" feature did not cause any surprise essentially, as this concept was disputed already in the scientific literature long since. Also, it was clear what was explained in the motivation of the Act in the following way: "its omission ... does not mean that the councils would not exert power in the future; their way of exerting power has not special character and it is based on the fact that the councils are part of the socialist system of the State, carrying into effect the power of the people." As the importance of the relations of the councils with the masses has been emphasized in the Act, the omission of the definitions of the so-called mass organization character was mostly approved. It was quite natural that the representative character of the council organization came into prominence since the concept of representation, together with its numerous consequences, formed a significant part of the acitivity of the councils in earlier years as well.

It was the clarification of the powers of the Self-Government bodies that presented itself as major problem in the course of the drafting and execution of the Act on the councils. (Besides, problems of competences were raised in a particularly sharp way.) It should be mentioned that the contents of Chapter I were approached in a more negative way in the ministerial motivation of the draft bill, giving a well-grounded explication of the omission of earlier definitions. The new definitions were not explained, however, just as there was given no interpretation of the Self-Government character. The more, there is no intention at all to give an appropriate grouping of the targets of Self-Government, as it is clear from the text of Chapter II of the act. (A not complete enumeration of the rights of Self-Government was given only in the speech of L. Fehér, deputy prime minister, made during the debate of the draft bill.[10] Although there was much talk in the course of the codification work of the mistake to "borrow" outlived and, the more, heavily deformed models of the bourgeois State of the 18th century, numerous confused concepts emerged in this field as a consequence of the unclarified basis. Anachronistic views took shape on the rights of Self-Government at a time when the necessity of the general revision of the

[9] *A tanácsok helye és szerepe a szocialista építés jelenlegi szakaszában* (Place and role of the councils in the present phase of socialist building work). Budapest, 1969.

[10] *Állam és Igazgatás*, 3/1971. p. 207.

rights in question was accepted already all over the world. As for the relationship of the centralistic and decentralized elements of the economy, it was a particularly important need to make the views clear in this respect.

The term "Self-Government" is the adequate definition of the concept of a distribution of targets in a given part of the Hungarian public administration according to which the local and regional councils, as elected bodies, are granted autonomous rights in economic and other fields. Nevertheless, the said autonomy does not mean any separation from the realization of the purposes of the state; on the contrary, it is destined to put them into reality in a more reasonable way. Taking into consideration, furthermore, that it is impracticable to think of important development schemes in the fields of power supply, transports or, most frequently, public health, cultural targets of higher level etc. as being realized, under contemporary conditions, within "municipal" frames, it became indispensable to deliminate the targets bearing upon the activity of the village, city, and county bodies with an "autonomous" character, and to determine the appropriate forms of co-operation. With the enactment of the 1971 bill on the councils, there was no intention to let revive the earlier concept of Self-Government; on the contrary, a *concept parallel to the economic reforms should have been realized* in the state administration, aimed at the co-ordination of local and regional, state and social forces, with a view to solve the problems practicable within the said frames in the maximum possible decentralized way, in juridical terms within the competences of the organs concerned. As for the problems outside the said frames, co-operation with organs and organizations with national competence should have been adopted instead of hierarchic order, with the intention to make use of any practicable solution and means, in order to get nearer to the accomplishment of the targets in question.

Essentially, J. Varga's view according to which "*from the point of view of social policy,* the Self-Government element of the functioning and nature of the councils can be interpreted as their desirable and continuously increasing independence and autonomous activity on the way to realization"[11] should be accepted as a correct one. In this respect, attention is drawn by the said author to the necessity to secure the optimal distribution of labour.

V

As three years passed after the enactment of the Bill on the councils, it is well worth to have a look at the problems that present themselves for the time being. It could be stated that some rights of Self-Government have been established and these have been put in practice almost without causing any difficulty. To take examples, a

[11] VARGA, J.: *A tanácstörvényben megfogalmazott elvekről* (On the principles put down in the Act on the Councils). Állam és Igazgatás, 10/1971. p. 872.

satisfactory practice has been established in the local and regional councils concerning the formation of their own organization and the election or nomination of their heads, respectively. Accordingly, there is hardly any need to change or correct this practice. As it seems furthermore, no problems occurred in respect of the election of the Budapest and county councils what, anyway, may be regarded reasonably as one of the most interesting manifestation of Self-Government functions.[12] Nevertheless, the *restricted* mandate of the delegates should be emphasized in a still clearer way in the future in case of indirect elections, as well as the content of their mandate i.e. their obligation to represent the interests of the villages and cities concerned in their activity in the county councils, and their responsibility for the appropriate accomplishment of the aforesaid obligation in face of the council or councils by which they were elected. The importance of this system is not limited to announce local interests "upwards" i.e. to higher instances but, besides, to make thus the county council an actual centre of co-ordination, i.e. an autonomous body of the entity of the villages and cities concerned. In the absence of this, however, the democratic right of say of the villages and cities in planning and budget-making can be hardly imagined. This is the reason for which an act of election is insufficient to help the purpose of the actual election law to get realized; the indirect election is only a means to secure the appropriate representation of the wishes of the local organs of Self-Government i.e. of regional interests, just as to establish a convenient organization of co-ordination.

One of the most important legal constituent of Self-Government powers has been the *framing of statutes,* being equal to legislation in villages, cities, and counties (or in districts of the capital and the capital proper, respectively). As it is put down in paragraph (1) of Article 34 of the Act on the Councils, the council has the power to make statutes "destined to execute legal rules or to regulate social relations requiring legal dispositions." Considering the statute-making activity of the councils one has the impression, however, that the course of development has been insufficient in recent years, in case of the villages in particular. As to the principal causes of this state of things, they seem to be the result of an inadequate practice, adopted long since, in which statutes have been made upon the initiative of a central or a county body, and the local councils have been disinclined to make law in the absence of initiatives referred to above. It is clear, however, that this may only give birth to an unnecessary centralism, for if social relations of local importance i.e. without national importance are not regulated by the legal rules of the local and regional councils, the gaps that thus present themselves have to be filled up, sooner or later, by organs with national competence and, clearly, the differences occurring between the various regions of the country as a matter of fact, will not be reflected by the rules created. It would be needed essentially that, just as the bodies with national competences, the local coun-

[12] By virtue of the Hungarian election law, i.e. Act III of 1966, amended in 1970, the members of the county councils and the Budapest council are elected by the local (village, city, or Budapest district) councils, consequently the said councils are bodies expressing and summing up the interests of the local councils.

cils, led evidently by the city councils, would proceed to the systematic compilation of a programme comprising the needs and the order of local legislation. Thus the local organs of statute-making would be established.

The *organizational and functional statutes,* mentioned in paragraph (1) of Article 28 of the Act on the Councils constitute the statutes of councils of the highest significance. As the local councils, and the regional councils as well, had no practice in statute-making, it was an appropriate and expedient measure according to which the president of the Office of the Councils, i.e. a body set up to carry out the direction of the councils within the frames put down by positive law and the Council of Ministers, should be authorized to give directives for the framing of statutes. Just as it was reasonable to give the directives mentioned above, in which no major mistakes could be found, the influence they had on the statutes failed to be just as unequivocal for the majority of the cases, for the statutes in question became not seldom too uniform on account of the assistance given in a centrally-guided way and legislation proper became thus an unnecessarily comfortable activity.

Evidenced by the investigations made in the course of the last months, the deficiencies of statute-making appear particularly in the failure of the city and village councils to codify *their own practices,* although these have revealed frequently the results of up-to-date experiments. As regards the powers of decision-taking of the meetings of the councils, the co-operation between the councils and various other organs and organizations in their economic activity and in other fields, the distribution of work between the functionaries, the working of village meetings, the features of a reasonable and appropriate practice differing, however, from that of other councils, could be revealed frequently. Clearly, excessively delimitated central models could be but discouraging for them. It could be thus heard frequently that, with the end of the first period of statute-making, essentially of an experimental character, more emphasis should be given to the said points in the second phase. As the modifications have to contribute to put down the well-proved local practice and the generally adopted local customs in the form of statutes, the decisions concerned must not take the shape of formal measures.

Furthermore, it should have to be recognized in the statutes that, although bearing upon the councils first and foremost, they are brought into prominence out of usual rules on account of the realization of co-operation tasks, and their influence is thus extended to other social problems of the village or city concerned as well. With the appropriate wording of the statutes and, also, of other rules and agreements resulting from them, same will become decisive factors of influencing the life of the entity of the village or city concerned, i.e. they really become statutes of the village or city in question.

As a matter of fact, the rights of Self-Government include the powers promoting the *economic* autonomy as put down in the Act on the Councils. It should be emphasized in this respect that all what has been established principles in the 1971 Act on the Councils reaches far beyond the practice of several years or, the more, of

two decades. Evidently, all this was made possible by the changes of the mechanism of economic management, i.e. the *economic reform* as introduced since 1968. It should be clear, however, on the other hand that the same rapid changes achieved by the companies concerned with actual production, enjoying solid economic relations and working under established economic conditions could not be expected in the functioning of the councils, due to the circumstance that just the councils were run economically under the most uncertain conditions in the earlier system of economic management. The fundamental problem affecting the necessity of economic autonomy is the rate of practicability of the said economic autonomy. This seems to be the cause of what is expressed in J. Varga's precited work so that "the self-government element of the functioning and nature of the councils cannot be idealized, principally as regards their economic activity."[13]

Prior to deal with the problem in question, a short survey should be given of the limits set for economic autonomy in the Act on the Councils.

As it is stipulated in the Act, the sources of revenue and the rate of financial participation of the councils as well as the amount of state financing have to be prefixed for a medium-ranged planning period i.e. five years. To mention some of the most important powers of the councils in this field, they are authorized to take decisions on the acceptance of credits, on fixing the rates of taxes to be collected within their competences and the determination of tax-like financial liabilities, furthermore to specify and put down their development programmes, plans, and budgets, and to dispose of state property entrusted to them. Evidently, with the scope of powers referred to above, the local and regional councils have a broad field of activity for putting into reality the targets laid down in the Act on the Councils.

a.) With *planned economy,* it is quite natural that a negative influence affecting the whole economy should be compensated always so that the effect of the measures applied should affect again the entire field of economy. In view of this, the enforcement of the topical requirements of the economic policy in the management of the councils, aimed at the restoration of the balance of the economy, must not be prevented by any reference to this or that concept of "Self-Government". This was the reason for which the provisional measures concerning the restriction of investments, taken in the course of the last years with a view to restore budget balance, were not limited to companies and institutions but the investments within the competence of the councils were affected as well. It seems probable that general measures in the field of economic policy, referred to above and coupled to economic planning, have to be taken into account in the future as well, although it is natural, on the other hand, that the more practice will have been in the possession of the economic organizations in the field of autonomous economic management and appropriate co-ordination, the less will be the requirement to take measures of this kind.

b.) Reference was made in the precedings to the contradiction between the necessity of economic autonomy and its actual possibilities. First and foremost, the

[13] VARGA: op.cit. p. 872.

problem is concerned with the appropriate utilization of the resources of the councils i.e. whether their development schemes comply with the real purposes of economic policy or other convenient targets, all the more as it has been occurred frequently that excessively disintegrated investments, renovations, and other projects could be observed. First of all, phenomena of this nature have been particularly characteristic for regions with smaller settlements. With the establishment of common councils for more than one village, some kind of a misunderstood "democratism" emerged, almost on national scale. Instead of enforcing the tendencies of the settlement development concept and strengthening the future centres in the best possible way, there have been views aiming at the realization of some sort of "egalitarianism" between settlements of different order of magnitude, motivated to escape possible charges of the "suppression" or pushing into the background of some villages. True, the publicity of the said concepts was insufficient to the extent that the necessary explication was not given often also for those who were in charge of their application in their daily work. It is under these conditions that the means of development are disintegrated and thus made ineffective or their efficiency gets reduced, respectively, even if this was not required. For this very reason, the efforts to be made in the economic field of Self-Government ought be so as to create units formed in the most expedient way and with appropriate centres for the basis of the juridicio-political government system. In the opposite case, all what could be made reasonably useful, equally from local, regional, and national points of view, would be wasted as if a holed sack were stopped up.

Accordingly, economic autonomy should not be regarded simply as a problem of financing, i.e. "debits" ought to be taken into account besides "credits" as well. Self-Government can be developed and strengthened only with a reasonable self-restriction i.e. guaranteed revenues of the councils are utilized in full accordance with the long-range concepts of their own development programmes. Reference should be made in this respect to the requirement, furthermore, according to which the securing of the support of the organizations, companies, and institutions which, with their members, profit from the development of the relevant local councils, is a particularly important task of the councils concerned. As a consequence of this, the councils have to place themselves to a solid basis of organization and co-ordination in this sense.

The co-operation agreements, concluded on the basis of the organizational and functional statutes of the councils have to be made in reality. On the basis of mutual advantages, a topical way of co-operation is to be ensured between the two types of organizations i.e. representative and producing-servicing or commercial, respectively, having in view that all of them are highly dependent on each other.

The accomplishment of all targets outlined in the precedings will make it possible to improve the independence and autonomous functioning of the system of the Hungarian councils in a *topical* way and with the development of *planning,* i.e. all what should be regarded as Socialist Self-Government.

Einige Probleme der Selbstverwaltung bei den ungarischen Räten

von

O. Bihari

Die Idee der Selbstverwaltung verlor in England und in den westlichen bürgerlichen Staaten bis zum XX. Jahrhundert ihren ursprünglichen Sinn und dies bedeutet im Vergleich zu den frühen liberalen Prinzipien des Staatsaufbaues eine große Veränderung. Die sowjetische Staatsorganisation kam aus der revolutionären Machtergreifung der örtlichen Kräfte zustande, die jedoch gegen die zerfallenden anarchistischen Formationen von Anfang an gekämpft haben. Sie schufen aus den Sowjets mit „selbstverwaltendem" Charakter eine „Staatsgewalt". Der Ausdruck „Selbstverwaltung" verschwand später aus den politischen Dokumenten. Die Frage der sozialistischen Selbstverwaltung warf sich wieder in den 50er Jahren auf. Die Verfassung Bulgariens vom Jahre 1971 und das 1972 modifizierte polnische Gesetz über die Nationalräte sprechen von den örtlichen und territorialen Organen als Organen der Selbstverwaltung des Volkes. In Ungarn wollte man seit 1971 mit einer gewissen Art der Selbstverwaltung die sich immerfort kräftigende und verwirklichende Selbständigkeit und Selbsttätigkeit der Räte betonen. Eines der bedeutsamsten rechtlichen Elemente der Befugnisse der Selbstverwaltung ist in Ungarn die Erlassung von Verordnungen und innerhalb dieser die Schaffung des Organisationsstatuts und der Geschäftsordnung der Räte. In ihnen kodifizierten die Räte ihre eigene frühere Praxis, und machten Vorschläge zu mehreren zeitgemäßen Versuchen. Die wirtschaftliche Selbständigkeit der Räte wurde andererseits seit 1971 besonders durch die Sicherung der zur Verfügung stehenden Einnahmen gefördert. Dieser Umstand kann aber kein Hindernis der Entwicklung der Volkswirtschaft sein und soll nicht zu einer wirtschaftlichen Zersplitterung führen. Die Räte werden zum realen Zentrum der Organisierung und Koordinierung.

Некоторые вопросы самоуправления в советах ВНР

О. БИХАРИ

В Англии и западных буржуазных государствах к XX в. идея самоуправления утратила свой подлинный смысл и это означает большое изменение по сравнению с ранними либеральными принципами строительства государства. Советский государственный строй был создан путём захвата местными силами революционной власти, с самого начала они боролись против распадающихся анархических формаций. Из Советов, носящих характер «самоуправления», была создана «государственная власть». Позднее выражение «самоуправление» исчезло из политических документов. Вопрос о социалистическом самоуправлении был поставлен вновь в 1950 годы. Конституция БНР от 1971 и польский закон о народных Советах, изменённый в 1972, упоминают местные и территориальные органы, как органы народного самоуправления. В Венгрии, начиная с 1971, характер самоуправления был призван подчеркнуть беспрерывно усиливающуюся самостоятельность и самодеятельность Советов. В Венгрии одним из важнейших правовых элементов полномочий в области самоуправления является принятие постановлений и внутри этого создание положений об организации и деятельности Советов. В этих положениях Советов кодифицировали свою прежнюю практику и проявили инициативу во многих современных опытах. С другой стороны, с 1971 года хозяйственной самостоятельности Советов содействует обеспечение им имеющихся доходов. Это, однако, не может препятствовать развитию национального хозяйства и не может создавать экономическое раздробление. Советы станут реальными центрами организации и координации.

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Bestrebungen zur Erleichterung internationaler Zahlungen

von

PROF.. I. MEZNERICS

Direktor der Ungarischen Nationalbank

Bei dem hohen Entwicklungsstand und rapiden Fortschritt des internationalen Handels rücken die wirtschaftlichen und rechtlichen Fragen der Behebung oder wenigstens Verminderung von Umständen in den Vordergrund, die die glatte Abwicklung des Handels und der damit verbundenen Zahlungen beeinträchtigen. In der Reihe dieser Umstände nehmen die Probleme der Beschränkungen aus Zöllen und devisenrechtlichen Regelungen eine bedeutende Stelle ein. Die Bestrebungen und Zielsetzungen zur Behebung oder Milderung der Gebundenheiten auf diesem Gebiete kamen am breitesten im Weltausmaß in solchen namhaften internationalen Dokumenten zum Vorschein, wie – unter anderem – das Abkommen von Bretton-Woods (1944) oder der GATT-Vertrag (General Agreement on Tariffs and Trade, 1947).

Gegenwärtiger Aufsatz erörtert die Bestrebungen zur Erleichterung der internationalen Zahlungen, und die bisher erzielten Erfolge. Nach Untersuchung der Rechtsnatur der bilateralen und multilateralen Clearing- und anderen Zahlungsabkommen legt er die Tätigkeit zur Erleichterung der internationalen Zahlungen in der Rechtsvereinheitlichung dar, die in der, für diesen Zweck aufgestellten ständigen Kommission der VN, in der UNCITRAL im Gange ist, und die in erster Reihe ein neues, für den Gebrauch im internationalen Handel vorgesehenes, *einheitliches Wechselgesetz* zu schaffen und weltweit zu verbreiten beabsichtigt. Ein anderer Teil dieser Rechtsangleichung universellen Charakters bezüglich internationaler Zahlungen (die einerseits auf die Weiterentwicklung der einheitlichen Normen der im internationalen Handel allgemein verwendeten Zahlungsart: des Akkreditivs, andererseits auf die Schaffung der einheitlichen Normen der, im internationalen Handel gleichfalls verbreiteten *Garantien* hinzielt), geht in der Internationalen Handelskammer von Paris (ICC) vor sich, unter Teilnahme sozusagen von allen Ländern (Banken – so auch denen der sozialistischen Länder) der Welt.

Als ein gut gelungenes Beispiel der regionalen Rechtsvereinheitlichung legt der Verfasser dar, und untersucht auch theoretisch die bei der Abwicklung des Warenverkehrs zwischen den Comecon-Ländern seit 1958 mit Erfolg verwendeten, unter dem Namen „Allgemeinen Lieferbedingungen" bekannten Regeln des durch alle Comecon-Länder angenommenen Kaufrechts die das einheitliche System der Zahlungen regeln, und die Rolle der gemeinsamen sozialistischen Bank (Internationale Bank für die wirtschaftliche Zusammenarbeit – Moskau) bei der Abwicklung der multilateralen Zahlungen.

Abschließend wirft der Verfasser einige Gedanken bezüglich der Untersuchung von Möglichkeiten und Bedingungen der finanziellen und valutären Kooperation im Ost-Westhandel auf.

I. Beseitigung der devisenrechtlichen Hindernisse

1. In unserem Zeitalter, das unter anderem wirtschaftlich durch den hohen Entwicklungsgrad des *internationalen Handels* und dessen voraussichtliches weiteres Wachstum gekennzeichnet ist, rücken die wirtschaftlichen und rechtlichen Fragen der möglichen Behebung der Umstände, die die glatte Abwicklung dieses Handels und der damit zusammenhängenden Zahlungen (internationalen Zahlungen) hindern, immer mehr in den Vordergrund. In der Reihe dieser Fragen spielten – bereits

seit den ersten Jahren nach dem zweiten Weltkrieg – die mit den *Zöllen und devisenrechtlichen Beschränkungen zusammenhängenden* Probleme an zahlreichen internationalen Verhandlungen, Konferenzen eine führende Rolle; auch in der rechtswissenschaftlichen und wirtschaftlichen Fachliteratur nimmt die Erörterung der Beschränkung des internationalen Handels durch Zoll- und devisenrechtliche Regelungen als eines, die Entwicklung des internationalen Handels hemmenden Faktor seit Jahrzehnten einen bedeutenden Raum ein.

Die Bestrebungen zur Abschaffung oder Milderung der Gebundenheiten aus dem Zollsystem oder der Beschränkung des freien Devisenverkehrs, bzw. die diesbezüglichen handelspolitischen Zielsetzungen sind am breitesten – im Weltausmaß – in solchen berühmten internationalen Dokumenten erschienen, wie – unter anderem – das Abkommen von Bretton-Woods (1944) oder der GATT-Vertrag (General Agreement on Tariffs and Trade 1947). Diese Verträge führten in der kapitalistischen Welt sowohl auf dem Gebiet der Behebung von *Devisenbeschränkungen,* bzw. der internationalen Anerkennung von den in gewissen Ländern doch sich notwendig erweisenden Devisengesetze, als bei der vertraglichen Ermäßigung der *Zolltarife,* sowie der Errichtung eines einheitlichen Zollgebiets (Gemeinsamer Markt) zu anerkennenswerten Ergebnissen. Diese Verträge, bzw. die als deren Ergebnis zustande gekommenen Institutionen haben jedoch – *infolge ihres diskriminierenden Charakters* –, den ursprünglichen Zielsetzungen gegenüber, die Idee der *universellen,* die ganze Welt umfassenden Kooperation und internationaler Arbeitsteilung nicht gefördert. Sie trugen daher nur in beschränktem Maße der Abschaffung der im Wege des internationalen Handels und der damit zusammenhängenden Zahlungen stehenden Hindernisse bei.

2. Im Kreise der den internationalen Handel hemmenden Faktoren werden wir – dem Gegenstand unseres Aufsatzes entsprechend – im nachfolgenden die *mit dem internationalen Handel verbundenen Zahlungen* und auf ihre glatte Abwicklung gerichtete Zielsetzungen vor Augen halten; im weiteren lassen wir also die Faktoren außer Acht, die den Warenverkehr selbst hemmen, so die zollrechtlichen Probleme.

Die Ordnung der internationalen Zahlungen und zugleich ihre rechtliche Natur hat sich grundsätzlich geändert, seitdem in der Mehrheit der an dem internationalen Handel beteiligten Länder *devisenrechtliche* Vorschriften gültig sind, entweder mit vorübergehendem Charakter, oder – wie in den Planwirtschaft führenden sozialistischen Staaten – als ein bleibender Bestandteil des Rechtssystems. Das Wesen der Änderung besteht darin, daß die von der freien Entscheidung und Vereinbarung der Parteien abhängige Möglichkeit und Art der Zahlungen durch Vorschriften administrativen Charakters abgeändert werden: die Zahlungen sind an Bewilligung gebunden, die bewilligten Zahlungen müssen in bestimmter Weise (bei bestimmten Geldinstituten, auf bestimmte Rechnungen) erfolgen. Die *früher* unter bloß *zivilrechtlichen* Bedingungen (regelmäßig durch Mitwirkung von Banken) abgewickelten Zahlungsoperationen (Überweisung, Inkasso, Akkreditiv und andere auftragsmäßige Bankoperationen) werden mit administrativen, verbindlichen Vor-

schriften durchflochten. Das Recht der Parteien zur freien Wahl kann – bezüglich der Modalitäten der Zahlungen – nur innerhalb der Rahmen von Normen verwaltungsrechtlichen Charakters ausgeübt werden. Das Rechtsverhältnis zwischen den Parteien sowie den Parteien und der Zahlungsstellen hat sich zufolge dessen geändert, und neue Rechtsverhältnisse sind zwischen den Parteien und den Zahlungsstellen, sowie den Zahlungsstellen beider Länder zustandegekommen.

Die Regel administrativen Charakters, die die auf Wahl der Parteien beruhende Ordnung und das früher rein zivilrechtliche Gepräge der Zahlungen modifizieren, können aus zwei verschiedenen Quellen entspringen, namentlich entweder von der innerstaatlichen Gesetzgebung einzelner Länder (von dem gebundene oder planmäßige Devisenbewirtschaftung statuierenden Gesetz, also dem *Devisenrecht)* oder aus einem mit anderem Staat abgeschlossenen internationalen Vertrag, d.i. *Zahlungsabkommen,* zufolge dessen die Vertragspartner in ihrer inneren Rechtsordnung (durch „Ratifikation" bzw. „Verkündung") entsprechende Normen schaffen, die die Staatsbürger und juristische Personen auch direkt verpflichten.

In den Staaten, die gebundene oder planmäßige Devisenbewirtschaftung führen, werden die obligatorischen Normen der internationalen Zahlungen vor allem im *Devisenrecht* des Staates, daneben aber auch in Zahlungsabkommen bzw. innerstaatlichen Rechtsregeln die auf deren Grund erlassen wurden, festgelegt. Wir können auch sagen, daß die durch innere Rechtsregel für die Staatsbürger (juristische Personen) verpflichtend gemachten Bedingungen des mit einem fremden Staat abgeschlossenen Zahlungsabkommens zum Bestandteil des Devisenrechts des planmäßige oder gebundene Devisenbewirtschaftung führenden Staates geworden sind.

Anders ist die Lage in solchen Ländern, wo verbindliche devisenrechtliche Vorschriften nicht gültig sind (freie Devisenbewirtschaftung führende Staaten). Wenn ein solcher Staat mit einem anderen, der zentralisierte (planmäßige) Devisenbewirtschaftung führt, in Handels- bzw. wirtschaftlicher Beziehung anderer Art steht, ist es unerläßlich, die Ordnung der Zahlungen in *internationalen* (zwischenstaatlichen) *Vereinbarungen* zu regeln. Es muß ja gesichert werden, daß der Gläubiger (Exporteur) des eigenen Staates den Kaufpreis der ausgelieferten Ware usw. trotz der die Zahlungen nach dem Ausland verbietenden (oder bewilligungspflichtig machenden) Normen des Devisenrechts des anderen Staates bekommt. Andererseits ist der andere (gebundene Devisenbewirtschaftung führende) Staat bestrebt, daß die von einem Staat mit freien Devisen an die Staatsbürger oder Firmen (Exporteure) des eigenen Staates gerichteten Zahlungen an einem Ort konzentriert werden, eine staatliche Bewirtschaftung bezüglich der vom Ausland stammenden Devisen ist ja nur so möglich. In dem Abkommen muß also die Möglichkeit ausgeschlossen werden, daß der Schuldige des einen Landes (Importeur) seine dem Gläubiger im anderen Lande (Exporteur) gegenüber bestehende Schuld auf anderem Wege als durch Zahlung an den bezeichneten zentralen Ort begleiche. Dazu ist jedoch notwendig, daß devisenrechtliche Gebundenheit sonst nicht anerkennende

Staaten ihre Schuldner (Importeure) durch *innerstaatliche, administrative Normen* verpflichten, daß sie ihre in der fraglichen Beziehung entstandenen Schulden nicht sonst wie als in der vertraglich vorgeschriebenen Weise begleichen können. Das ist übrigens nicht nur das Interesse des anderen Landes, bzw. des im anderen Lande lebenden Gläubigers, sondern auch das Interesse der Gläubiger im *eigenen* Lande, weil diese – nach dem Zahlungsabkommen – bis zu einer solchen Summe ihre Forderung befriedigen können, die aus den Zahlungen der Schuldner an die zentrale Zahlungsstelle zur Verfügung steht. Die Begleichung der Schuld durch nicht im Abkommen geregelte Zahlungsart („außer Clearing") verletzt also nicht nur die devisalen Interessen des anderen Staates, sondern auch die der Gläubiger des eigenen Staates.

Es ist also verständlich, daß die Zahlungsart auch in einem freie Devisenbewirtschaftung führenden Staat durch verbindliche Normen vorgeschrieben ist, wenn ein Zahlungsabkommen zwischen einem solchen Staat und dem gebundene Devisenbewirtschaftung führenden Staat besteht, das die Zahlungen an eine Stelle konzentriert (Clearing-Abkommen). Ein klassisches Beispiel für einen solchen Staat bietet die Schweiz, die eine freie Devisenbewirtschaftung führt, mit zahlreichen Staaten jedoch Clearing-Abkommen hat, und die zufolge dieser Vereinbarungen erlassenen innerstaatlichen Rechtsregeln die schweizerischen Staatsbürger und juristische Personen – mit strengen Sanktionen – verpflichten, ihre Schulden (Gegenwert von importierten Waren, Dienstleistungen usw.) durch Zahlungen an eine bestimmte Stelle, auf eine zentrale Rechnung zu begleichen. Verbindliche Normen bezüglich Zahlungen nach dem Auslande sind also auch in solchen, übrigens freie Devisenbewirtschaftung führenden Staaten durchaus möglich. Deren Gesamtheit können wir – obgleich es paradox klingt – Devisenrecht des Staates mit freier Devise nennen. Es ist üblich in diesen Fällen von „Clearingrecht" zu sprechen, jedoch muß man darüber im klaren sein, daß auch dieses eigentlich ein Devisenrecht bildet, das einen engeren, für je ein Land gültigen Sektor der Zahlungen nach dem Ausland berührt.

Noch handgreiflicher ist die Notwendigkeit der Regelung der gegenseitigen Zahlungen zwischen zwei Staaten durch Abkommen, wenn in beiden Ländern gebundene oder planmäßige Devisenbewirtschaftung geführt wird. In diesen Fällen wird das „Clearingrecht" als Inbegriff der zufolge des Abkommens durch innerstaatliche Rechtsnormen für Staatsbürger und Unternehmen festgesetzten Verpflichtungen zum Bestandteil des breiteren „Devisenrechts" werden.

Es ist zu bemerken, daß das früher (zwischen den Weltkriegen und in den Jahren nach dem zweiten Weltkrieg) weltweit allgemeine, strenge Clearing-System in den späteren Jahren – nach der Proklamierung der „äußeren Konvertibilität" der Währungen der westeuropäischen kapitalkräftigen Staaten – durch mehr „lockere" *Zahlungsabkommen* in den Hintergrund gerückt worden ist. Diese begnügen sich – anstatt des gebundenen Systems der gegenseitigen Abrechnung – mit der Gewährung der Zahlungsmöglichkeiten ohne die Zahlungen obligatorisch an einer Stelle

(bei der Notenbank) zu konzentrieren. Was unser Land betrifft, wickeln wir die aus dem internationalen Handel stammenden Zahlungen mit zahlreichen Staaten von Asien, Afrika, Südamerika auch heute im Clearingverhältnis ab, während es in meisten westeuropäischen Relationen gelungen ist das lockere, von Clearing-Gebundenheiten freie Zahlungssystem akzeptieren zu lassen.

3. Bei der Banküberweisung durch *Clearing* ergibt sich eine eigenartige Rechtslage. Das Clearing-Abkommen schließt die Kompensationsmöglichkeit der direkten Zahlung oder Abrechnung zwischen Schuldner und Gläubiger aus. Die Zahlung soll – im Sinne des zwischenstaatlichen Abkommens – im Clearing erfolgen, und das ursprüngliche Rechtsverhältnis verliert – zufolge der Überweisung im Clearing – sein rein zivilrechtliches Gepräge. Der *zivilrechtliche Anspruch* des Gläubigers seinem Schuldner gegenüber auf direkte Zahlung wird modifiziert: er hat gegen seinen Schuldner nur Anspruch (in zivilrechtlichem Sinne) darauf, daß dieser seine Schuld durch Zahlung an die Clearing-Stelle seines eigenen Landes (Devisenbank) in dortiger Währung begleiche. Zur selben Zeit entsteht seitens des Gläubigers gegenüber der Clearing-Stelle seines eigenen Landes die Forderung verwaltungsrechtlicher (öffentlich-rechtlicher) Natur, daß sie ihm den Gegenwert der durch den Schuldner im Clearing bezahlten Summe in einheimischer Währung auszahle. Dem Schuldner liegt (seinem Gläubiger gegenüber) *nicht nur zivilrechtliche Verpflichtung* in der Hinsicht ob, daß er den in der Währung seines eigenen Landes errechneten Gegenwert bei der Bank des eigenen Landes (Clearing-Stelle) bezahle, aber das kann von ihm auch die *Bank* des eigenen Landes fordern, und die Verpflichtung des Schuldners dem letzteren gegenüber hat schon administrativen Charakter. Unseres Erachtens ist die (insbesondere in der schweizerischen Literatur vertretene) Auffassung unrichtig, die die Möglichkeit verneint, wonach der Schuldner neben dem Gläubiger (zivilrechtlicher Aspekt) auch durch die eigene Bank zur Zahlung aufgefordert werden kann. Mangels dieser Möglichkeit könnte die Bank wegen Dekkungsmangel gegebenenfalls ihren Zahlungsverpflichtungen Gläubigern im eigenen Land gegenüber nicht nachkommen.

Nach dem Gesagten gerät ein neues Element in das zwischen Gläubiger und Schuldner bestehende ursprüngliche (zivilrechtliche) Rechtsverhältnis hinein: das Clearing-Verhältnis zwischen den Ländern des Gläubigers und des Schuldners. Infolge dessen *ändert sich* das zivilrechtliche Rechtsverhältnis zwischen Gläubiger und Schuldner einerseits, während ein *neues Rechtsverhältnis administrativen Charakters* entsteht: einerseits zwischen dem Schuldner und der Inkasso-Clearing-Stelle seines Landes, andererseits dem Gläubiger und der Auszahlungs-Clearing-Stelle seines Landes. Es gibt auch eine Auffassung wonach das jetzt erwähnte Rechtsverhältnis zwischen dem Schuldner und seiner Bank keinen bloßen administrativen Charakter, sondern auch zivilrechtlichen hat.[1]

[1] VASSILEV, L.: (Sofia): *Régime juridique des paiments internationaux par clearing dans le commerce international entre pays à structure économique différente.* (Aspects juridiques de commerce avec les pays d'économie planifiée.) Paris, 1961.

Sogar: außer den (geänderten) zivilrechtlichen Verhältnissen zwischen Schuldner und Gläubiger, ferner außer dem verwaltungsrechtlichen Verhältnis zwischen dem Schuldner bzw. Gläubiger und der Clearing-Stelle des eigenen Landes spielt auch noch ein Rechtsverhältnis dritter Art bei den im Clearing abgewickelten Zahlungen eine Rolle: die Überweisung des auf dem Clearing-Konto eingesammelten Geldes (einbezahlt durch die Schuldner) zur Clearing-Stelle (Bank) des anderen Landes, ferner die Auszahlung der von der anderen Bank erhaltenen (gutgeschriebenen) Summe zugunsten bestimmter Rechtssubjekte (die ursprünglichen zivilrechtlichen Gläubiger) werden durch die Vertragspartner (Banken) *aufgrund von völkerrechtlichen,* in dem Zahlungsabkommen eingegangenen Verpflichtungen geleistet.

Aus dem Rechtsverhältnis zwischen den beiden Banken folgt, daß die Bank die durch den Importeur eingezahlte Summe zur anderen Bank zu transferieren verpflichtet ist. Das kann nicht einmal mit der Einwendung vermieden werden, daß sie eine fällige Forderung dem Importeur gegenüber hat. Die durch den Importeur eingezahlte Summe hat je eine *bestimmte Destination,* und sie kann weder zur Kompensation der ansonsten berechtigten Forderung der Bank dienen, noch durch einen *anderen Gläubiger* beschlagnahmt werden.

Zusammenfassend: die glatte Abwicklung der internationalen Zahlungen stößt infolge devisenrechtlicher Vorschriften in der Mehrzahl der Staaten in aller Welt auf Hindernisse, deren Behebung die internationalen – bilateralen oder multilateralen – Zahlungsabkommen zum Ziel haben. Als Folge dessen wird das frühere, bloß zivilrechtliche Gepräge der internationalen Zahlungen (in der Zeit vor den Devisenbeschränkungen) geändert, und das *zivilrechtliche* Verhältnis zwischen Verkäufer und Käufer wird mit verbindlichen *administrativen* Regeln verflochten, die andererseits als Vollzug eines *internationalen* Vertrages zwischen zwei, oder mehreren Staaten zustande kamen.[2] Demgemäß:

a) der Verkäufer *kann nicht beanspruchen,* daß der Käufer – auf zivilrechtlichem Grund – *direkt* ihm zahle, sondern nur daß der Käufer den Kaufpreis bei der Bank seines eigenen Landes zu seinen (des Verkäufers) Gunsten einbezahle;

b) zur im Punkt a) erwähnten Einzahlung ist der Käufer seiner eigenen Bank gegenüber auch aufgrund eines *administrativen* Rechtsverhältnisses verpflichtet;

c) die Bank des Verkäufers ist verpflichtet aufgrund eines *internationalen Vertrages* die durch den Käufer auf das Clearing-Konto eingezahlte Summe zur anderen Bank (ins Käufer-Land) zu überweisen;

d) der Verkäufer kann die Zahlung von der Bank seines eigenen Landes aufgrund eines *administrativen* Rechtsverhältnisses (innerstaatlich verpflichtenden Regelung) fordern.

[2] Eingehender wird dieses Problem vom Verfasser erörtert, im Aufsatz *Changes in the Legal Nature of International Payments,* der in einem Jahrbuch der ungarischen Sektion von ILA erschien. (Jg. 1966, p. 97–130 pp.)

II. Bestrebungen in der Richtung der universellen Rechtsvereinheitlichung

1. In der Reihe der Umstände, die den internationalen Handel und die damit zusammenhängenden Zahlungen hindern, müssen wir – neben den zoll- und devisenrechtlichen Vorschriften – die Schwierigkeiten erwähnen, die aus der *Verschiedenheit der nationalen Rechte* des Handels und der Zahlungen entspringen. Die Vielfalt und Unübersichtlichkeit der in den verschiedenen nationalen Rechtssystemen Jahrhunderte hindurch entstandenen Regelungen ist auch unter diejenigen Faktoren einzureihen, die als Hindernis des internationalen Handels und der damit verbundenen Zahlungen erkannt wurden, ob das Zustandekommen der Verträge, ob die gerichtliche Entscheidung (Schiedsgericht) der Rechtsstreite aus dem Vertragsabschluß oder der Erfüllung fraglich sind. Das internationale Privatrecht je eines Staates und die neuzeitliche Entwicklung dieses Wissenszweiges trugen selbst nur teilweise zur Abwehr der Hindernisse bei, indem sie mit der Statuierung von Kollisionsnormen für die Vertragsschließenden sowie die Organe der Regelung der strittigen Angelegenheiten (Gerichte) die Konflikte aus der Verschiedenheit der nationalen Rechte zu beheben und die Orientation in dem Dschungel der nationalen Rechtssysteme zu erleichtern trachten.

Die Erkentnis dieses Hindernisses im Wege des internationalen Handels und den damit zusammenhängenden Zahlungen ist nicht neueren Datums. In unserem Jahrhundert ist einer der bezeichnendsten positiven Merkmale der internationalen Rechtsentwicklung die Ausbreitung der Bestrebungen nach Rechtsvereinheitlichung auf immer breitere Kreise, und damit im Zusammenhang der Aufschwung der vergleichenden Rechtswissenschaft. Die in den ersten Jahrzehnten des Jahrhunderts mit großem Schwung geführten und auf mehreren Teilgebieten des Rechts bedeutende Erfolge aufweisenden Vereinheitlichungsarbeiten wurden zweimal brutal durch die Weltkriege unterbrochen, und in der Zeit zwischen beiden Weltkriegen durch die unseren Kontinent überschwemmende faschistische Herrschaft zurückgeworfen. Auf die Wiederaufnahme der unterbrochenen Arbeiten, die Idee der *universellen Rechtsvereinheitlichung* wirkte sich auch die Atmosphäre des kalten Krieges der ersten Friedensjahre ungünstig aus. Die allgemeine Rechtsentwicklung wird jedoch heute, seit Anfang der 60er Jahre in der Periode der friedlichen Koexistenz, wieder durch den Neubeginn der Vereinheitlichungsarbeiten, die Weiterführung dieser Versuche in immer breiterem Kreise und mit immer mehr Teilnehmern, durch die Forschung nach neuen Vereinheitlichungsgebieten, neuen Möglichkeiten, Zunahme der diesbezüglichen internationalen Konferenzen, Aufschwung der Fragen der Rechtsvereinheitlichung erörternden Literatur gekennzeichnet. All das wird durch den Versuch der Vereinten Nationen – auf Grund seiner universellen Zielsetzungen – bei weitem übertroffen: durch Unternehmungen zur Lösung einzelner, umfassender Aufgaben der Rechtsvereinheitlichung und zwar: einerseits die – nunmehr seit einem Vierteljahrhundert – *im Kreise des Völkerrechts* durch die VI.

Kommission der VN geführten und mehrere konkrete Erfolge aufweisenden Arbeiten, andererseits die (auf Initiative der ungarischen Regierung erfolgte) Errichtung im Jahre 1967 einer ständigen Kommission: UNCITRAL (United Nations Commission on International Trade Law) mit dem Ziel der Vereinheitlichung, Harmonisierung des *Rechts des internationalen Handels* und der damit zusammenhängenden Zahlungen. Obgleich diese sich jährlich versammelnde, durch zahlreiche Arbeitsgruppen fortwährend fungierende, mit mehreren internationalen Organisationen kooperierende Kommission nach ihrer bisherigen Aktivität sich mit solchen Ergebnissen, Vereinbarungen, die die VI. Kommission bereits produzierte, nicht rühmen kann, ist die Errichtung dieser Organisation zweifellos das wichtigste Ereignis im Zuge der bisherigen Bestrebungen nach je einheitlicherer und universellerer Regelung der internationalen Wirtschaftsbeziehungen, das die als am zugänglichsten erscheinenden Wege der Rechtsvereinheitlichung für Jahrzehnte bezeichnet, und den Fortschritt beschleunigt. Das wird bewiesen durch die bisherigen Veröffentlichungen der UNCITRAL, insbesondere die Bände über die Aktivität der ersten sechs Jahre, die Jahresberichte, sowie die weltweit verbreitete UNCITRAL-Literatur.

2. Vom Kreise der mit dem internationalen Handel verbundenen Zahlungen *(„internationale Zahlungen")* sind solche Probleme an der Tagesordnung der UNCITRAL, wie die weltweite Harmonisierung und mögliche Vereinheitlichung des *Wechsel- und Scheckrechts* („negotiable instrument"), ferner die Weiterentwicklung der einheitlichen Regelung des im internationalen Handel eine so große Rolle spielenden *Akkreditivs* (documentary credits, bankers' commercial credits), sowie die Harmonisierung der nationalen Rechte in Bezug auf die *Bankgarantien* und anderer Gewähren.

a) Im Kreise des *„negotiable instrument"* versucht die Kommission – laut einem nach Diskussionen durch mehrere Sitzungsperioden im Jahre 1970 gefaßten Beschluß – einen Entwurf auszuarbeiten und danach durch internationales Abkommen annehmen zu lassen, der die einheitliche Regelung (uniform rules) eines neuartigen, nur im Kreise der internationalen Transaktionen verwendbaren wechselartigen (eventuell auch als Scheck dienenden) Instruments beinhalten würde, übernommen einerseits von den Genfer Abkommen, andererseits von den angelsächsischen Wechselrechtssystemen die in der Praxis bewährten Lösungen, ohne daß der Beitritt zum Abkommen die weitere Geltung der bereits vorhandenen wechselrechtlichen Gesetze berühren würde, so in erster Reihe im Kreise der innerstaatlichen Verhältnisse, jedoch – mangels der Stipulation des neuen „internationalen Instruments" – auch bei ausländischen Transaktionen.

Diese Kompromißlösung – also die Beschränkung der Vereinheitlichung nur auf den Kreis der internationalen Zahlungen und den Fall der besonderen Stipulierung – ist darauffolgend entstanden, nachdem es aus den breiteren Untersuchungen und Diskussionen offensichtlich wurde, daß der Versuch der Vereinheitlichung durch Annahme der Genfer Abkommen in breiterem Kreise keinen Erfolg bringen

kann: die Wechsel- und Schecksysteme des angelsächsischen Rechtskreises – durchdrungen von Normen und Geist des „common law" (kein kodifiziertes, sondern in der Judikatur ausgeformtes *Gewohnheitsrecht*) sind kaum mit den Genfer und ähnlich eingestellten, die formellen Erfordernisse in den Vordergrund stellenden Regelungen vereinbar. Mit der breiteren Annahme der Genfer Abkommen kann man also vielmehr nur in jenen Ländern rechnen – die Kommission soll ihre Anstrengungen in dieser Richtung konzentrieren – die trotzdem, daß sie das System des römischen Rechts akzeptiert haben („civil law"), die erwähnten Abkommen noch nicht ratifiziert, bzw. ihre innerstaatliche Gesetzgebung nicht entsprechend adaptiert haben, oder die zur Zeit die Vorschläge zur einheitlichen Regelung studieren. Nach der an den Sitzungen der UNCITRAL vorherrschenden Meinung wäre auch von der Lösung kaum ein Erfolg zu erwarten, die die *Genfer Abkommen* durch deren Revision für die Länder des anglo-amerikanischen Systems annehmbarer zu machen trachtete; die den Genfer Abkommen angeschlossenen einheitlichen Gesetze beziehen sich auf innerstaatliche und internationale Verhältnisse gleicherweise, und es ist reell kaum zu hoffen, daß entweder die den Abkommen schon beigetretenen Staaten, oder die dem anglo-amerikanischen System folgenden geneigt wären ihre eigenen Gesetze und Praxis bloß deswegen zu modifizieren, weil sie in den internationalen Beziehungen eine höhere Stufe der Einheitlichkeit erreichen.

Den neuen einheitlichen Entwurf über den internationalen Wechsel, der aufgrund von allen Mitgliedsstaaten gesammelten Angaben unter Einbeziehung der interessierten internationalen Organisationen (UNIDROIT, International Monetary Found, Bank der Internationalen Wirtschaftlichen Zusammenarbeit der sozialistischen Länder, Bank for International Settlement, Internationale Handelskammer) entworfen wurde, wird in einer von der UNCITRAL 1972 errichteten Arbeitskommission – nötigenfalls mit Einbeziehung von Sachverständigen – „weiterverfeinert", vorbereitet.

b) Bezüglich des „Akkreditivs" war die Meinung an den Verhandlungen, die aufgrund des Berichtes der Internationalen Handelskammer (International Chamber of Commerce: ICC) geführt wurden, einheitlich, daß das *„Uniform Customs and Practice for Documentary Credits"* – ein Werk der ICC das zuletzt 1962 revidiert und endlich auch von den englischen Banken akzeptiert wurde – sich in der Praxis – auch die Rechtsprechung inbegriffen – bewährt hat. Im Interesse der einheitlichen Auslegung gewisser Vorschriften, ferner der Klärung einiger aus den neuen Liefermethoden (z. B. container) sich ergebenden Fragen beschäftigt sich die ICC auch weiterhin mit der *Weiterentwicklung der einheitlichen Regelung,* und zwar nunmehr im Auftrag der UNCITRAL und unter Einbeziehung der sozialistischen Staaten, die – nachdem ihre Kammern an der ICC nicht beteiligt sind – bisher an den Kodifikationsarbeiten nicht teilnehmen konnten.

c) Die Vorbereitung des einheitlichen *Reglements* bezüglich *Bankgarantie* und anderer Garantien ist noch in einem ziemlich anfänglichen Stadium. Diese Arbeit ist jetzt gleichfalls in der ICC im Gange. Die auch auf diesem Gebiet wünschenswerte

Vereinheitlichung geriet zufolge eines ungarischen Vorschlags an die Tagesordnung der UNCITRAL. Laut dieses Vorschlags müßte man die einheitlichen, in der internationalen Praxis entstandenen Regeln der in der Finanzierung des internationalen Handels und in der Abwicklung der Zahlungen in der letzten Zeit äußerst verbreiteten Bankgarantie ebenso „kodifizieren", wie es mit der einheitlichen Regelung der Praxis bezüglich Akkreditiv und Dokumenteninkasso geschah. Dies wäre um so mehr notwendig, weil es in der Praxis einerseits wegen *terminologischer Differenzen* (z.B. der kontinental gemeinten „Garantie" entspricht der angelsächsische Begriff „contract of indemnity", während man unter dem englischen „guarantee" gewöhnlich die Bürgschaft versteht – also suretyship; in den USA erfüllt das „irrevocable letter of credit" (Akkreditiv) die Rolle der Bankgarantie, usw.), andererseits aber weil eine Regelung durch innerstaatliche Gesetze oder internationale Vereinbarung fehlt, wird die Grenze zwischen *Bankbürgschaft und Bankgarantie* verschwommen, obwohl die Differenz zwischen beiden Rechtsinstituten wesentlich ist. (Die Unterschiede werden in dem ungarischen Vorschlag eingehend analysiert.)

III. Einheitliches Zahlungssystem im Handel der sozialistischen Staaten

1. Um ernste Ergebnisse der universellen Bestrebungen nach Rechtsvereinheitlichung zu erreichen, die nunmehr unter der Ägide der Vereinigten Staaten im Gange sind und oben geschildert wurden, wird noch eine längere Zeit benötigt. Wir dürfen zugleich die Tatsache nicht mißachten, daß auch heute solche Abmachungen bestehen und funktionieren, die sich auf den internationalen Handel (Kaufgeschäft) und die damit verbundenen Zahlungen beziehen. Diese Abkommen bedeuten – obwohl sie nicht universellen Charakters sind – doch eine *einheitliche* Regelung für einen bestimmten Kreis der Staaten hinsichtlich des internationalen Handels und der damit verknüpften *Zahlungen*. Das hervorragendste Produkt dieser regionalen Rechtsvereinheitlichung ist vielleicht die unter dem Namen „Allgemeine Lieferbedingungen" (AB) zusammengefaßte einheitliche Regelung des internationalen Warenkaufs, die in dem erwähnten Kreis auch die Ordnung der mit dem internationalen Kaufgeschäft verknüpften Zahlungen festsetzt. Dieses Abkommen funktioniert seit 1958, in der modifizierten Form von 1968.[3] Die Zahlungen im Warenverkehr zwischen sozialistischen Staaten werden teils aufgrund der in den ALB festgesetzten Regeln, teils laut der Regelung im Abkommen von 1963 über die *multilaterale Verrechnungsordnung* und Errichtung der Bank der Internationalen Wirtschaftlichen Kooperation abgewickelt.

[3] Von der reichen Literatur weisen wir jetzt nur an folgende Studien, die die ALB vom Gesichtspunkt der Rechtsvereinheitlichung erörtern: Eörsi, Gy.: *Regional and universal unification of the law of international trade.* The Journal of Business Law, 1967; Szász, I.: *Allgemeine Lieferbedingungen. Einheitliches Gesetz für den internationalen Handel.* Budapest, 1974.

Im nachfolgenden versuche ich das Wesen dieses *einheitlichen Zahlungssystems* darzustellen, und zwar so, daß ich die zwei im vorherigen hervorgehobenen Gesichtspunkte vor Augen halte, namentlich – einerseits, daß die zivilrechtlichen Elemente auch in diesem Zahlungssystem mit der – als Folge des internationalen Abkommens zustandegekommenen – Regelung administrativen Charakters verflochten sind; andererseits, daß es im heutigen Zeitalter der Bestrebungen nach allgemeiner Rechtsvereinheitlichung beachtenswert ist, eine bereits *verwirklichte* Vereinheitlichung vor uns zu haben, die – obgleich mit regionalem Charakter – in einem beträchtlichen Teil der Welt funktioniert, und in dieser Weise als ein nützliches Mittel der Entwicklung des internationalen Handels und der je reibungsloseren Abwicklung der internationalen Zahlungen erscheint.

2. Bei den internationalen Zahlungen ist die Erscheinung heutzutage allgemein feststellbar, daß diese Zahlungen heute nicht mehr ausschließlich im Rahmen des Instituts des bürgerlichen Rechts (Bankgeschäfte des Zivilrechts) abgewickelt werden, sondern zur Funktion der letzteren auch eine administrative Regelung in internationalen Verträgen und infolge deren im innerstaatlichen Rechtssystem nötig ist. Das ist natürlich auch für die Zahlungen der sozialistischen Staaten untereinander gültig, in allen diesen Staaten gibt es ja planmäßige, geregelte zentrale Devisenbewirtschaftung; dies hängt aber notwendigerweise – wie wir im vorherigen darlegten – mit der auf Abkommen beruhenden Regelung zusammen. Mit dieser, und der ergänzenden inneren, verbindlichen Regelung rücken die administrativen Elemente in der rechtlichen Ordnung der zwischenstaatlichen Zahlungen – zu ungunsten der zivilrechtlichen Formen (Bankgeschäfte) – noch mehr in den Vordergrund, als es in der Beziehung zu anderen Staaten der Fall ist. In diesem Kreise ist die öffentlichrechtliche Orientierung der Zahlungsverhältnisse (die finanzrechtliche Geregeltheit) für die bilateralen Beziehungen der sozialistischen Staaten ebenso bezeichnend, wie für das auf diese gebauten multilateralen Systeme.

a) *Ordnung der bilateralen Zahlungen.* Die RGW-Staaten (Comecon) haben im Jahre 1958 in einem Abkommen, das 1968 abgeändert wurde, die *allgemeinen Bedingungen der Außenhandelslieferungen* (ALB) festgelegt. Auch das System der mit den Warenlieferungen verbundenen *Zahlungen* wurde im Abkommen geregelt.

Die bisherige Funktion dieses Zahlungssystems hat befriedigende Erfolge erzielt. Solche Probleme, die bei der Zahlung im Clearing-System aufzutauchen pflegen, sind bei den Zahlungen zwischen sozialistischen Ländern kaum erschienen. Bei der Abwicklung des Warenverkehrs zwischen den sozialistischen Ländern und bei den bezüglichen Finanzoperationen werden solche streng verschanzten geschäftlichen Lösungen nicht benötigt, wie es im Verkehr dieser Staaten mit den kapitalistischen Staaten üblich ist. Wenn auch die ALB die Möglichkeit der Anwendung der unter kapitalistischen Umständen entwickelten *Bankgeschäfte* nicht ausschließt, wird es selten vorgenommen, und der größte Teil der mit der Warenlieferung verbundenen Zahlungen wird in der durch die ALB geregelten Weise, sozusagen *automatisch* abgewickelt.

Das Wesen der sog. *„Promptzahlungen"* laut ALB besteht darin, daß die Bank des Verkäuferlandes den Gegenwert der, für den Käufer gelieferten (aufgegebenen) Ware gegen Übernahme bestimmter Dokumente (Faktura, Frachtbrief usw.) gleich bezahlt, bzw. auf dem bei ihr geführten Konto dem Verkäufer gutschreibt, ohne dazu einen besonderen Auftrag vom Käufer oder von der Bank des Verkäuferlandes zu bekommen. Die Bank des Käuferlandes wird dann nach dem Erhalt der Avisos über die Belastung und der Dokumente das Konto des Verkäuferlandes mit der entsprechenden Summe anerkennen, und mit dem entsprechenden Gegenwert – nunmehr freilich in der Landeswährung – das bei ihr geführte Konto des Käufers belasten, und ihm die Dokumente ausgeben.

Die Anwendung dieser vereinfachten Zahlungsart wird nur durch die enge wirtschaftliche Zusammenarbeit der dem RGW angehörenden, Planwirtschaft führenden Staaten ermöglicht. Die Warenmengen, die aufgrund der in Warenverkehrsabkommen verbindlich vorgeschriebenen Kontingente in den Export- und Importverträgen der Außenhandelsunternehmen erscheinen, sind in den Volkswirtschaftsplänen beider Länder verankert, so daß die tatsächliche Abwicklung einen Teil der Planerfüllung beider Staaten bildet. Ebenso stellt es das Interesse der Volkswirtschaften beider Länder dar, daß die Geldbewegung der Warenbewegung auf dem Fuße folge, und das auf beiderseitigem Vertrauen beruhende Verhältnis, Bereitschaft zur Zusammenarbeit, die die Verbindung zwischen sozialistischen Organisationen auch außerhalb des Staates kennzeichnen, bietet die Möglichkeit für die schnelle, die vorherige Bindung der Geldmittel nicht erfordernde finanzielle Abwicklung.

Wir sollen nun die *rechtliche Natur* des Zahlungssystems der „Allgemeinen Lieferbedingungen" etwas eingehender untersuchen.

Die Zahlung (Gutschrift), die für den Verkäufer gegen Dokumente gewährt wird, erinnert auf den ersten Blick an die Zahlung im Rahmen des *Akkreditivs* gegen Dokumente. Sie unterscheidet sich jedoch grundlegend dadurch, daß hier einerseits kein besonderer Auftrag seitens des Käufers oder dessen Bank vorliegt, bzw. die akzeptierbaren Dokumente separat nicht bezeichnet werden, andererseits dadurch, daß die Bank mit dem Verkäufer keine Geschäftsverbindung eingeht, wie die Akkreditiv eröffnende oder bestätigende (zahlende) Bank.

Die Bank des Verkäufers zahlt im Promptzahlungssystem des sozialistischen Warenverkehrs nur bedingt. Das ist eine *Zahlung mit Vorbehalt,* ohne daß eine diesbezügliche Erklärung nötig wäre, wie es bei der bedingten, mit Vorbehalt erfüllten Zahlung beim Akkreditiv geschieht. Zur Erfüllung, endgültigen Zahlung wird diese bedingte Zahlung nur dann, wenn der Käufer deren Rückerstattung innerhalb der festgesetzten Frist nicht beantragt.

Der Käufer kann seines *Rechtes zur Rückerstattung* – und zwar für die ganze bezahlte Summe oder einen Teil davon – innerhalb 14 Tagen davon gerechnet Gebrauch machen, an welchem Tage *die Bank* des Käuferlandes die Rechnung des Verkäufers erhalten hat. Die ALB bestimmen diejenigen Fälle ausführlich, in denen

der Käufer diese Rückzahlung beanspruchen darf. Solche sind: der Käufer hat die Ware nicht bestellt, die Ware wurde bereits früher bezahlt, nicht alle Dokumente wurden eingereicht, usw. Aufgrund von quantitativen oder qualitativen Beanstandungen kann man keine Rückerstattung beantragen, das natürlich kein Hindernis der Geltendmachung des unter diesem Rechtstitel erhobenen Anspruchs auf gerichtlichem (schiedsgerichtlichem) Wege darstellt.

Das Rückerstattungsverfahren wird nach gleichen Regeln, „automatisch" abgewickelt, wie die Bezahlung des Kaufpreises.

Die *Rolle der Banken* wird mit der Durchführung der Promptzahlung und der eventuellen Rückerstattung abgeschlossen. Der weitere Streit zwischen Verkäufer und Käufer ist im Wege der direkten Verhandlung, eventuell des Verfahrens vor dem Schiedsgericht der Handelskammer beizulegen.

Aus dem Gesagten ist ersichtlich, daß die Banken bei der Abwicklung des Zahlungsverkehrs aus den Warenlieferungen zwischen sozialistischen Ländern keine solche, im allgemeinen komplizierte Rechtsgeschäfte abschließen, wie in kapitalistischen Beziehungen. Wenn auch in dem Umriß des Promptzahlungssystems gewisse Elemente je eines Bankgeschäftes zu entdecken sind, so z. B. die Ähnlichkeit mit dem Dokumenteninkasso, ist hier für die Tätigkeit der Banken doch nicht der Abschluß von Geschäften. Geschäftliche Beziehungen, namentlich Bank- bzw. Kontokorrentverträge gibt es natürlich zwischen den Banken zweier Staaten, sowie je einer Bank und dem Verkäufer – bzw. Käufer – Außenhandelsunternehmen. Hinter der Promptzahlung gegen Warendokumente, bzw. hinter der Rückerstattung könnten wir ferner irgend eine Art stillschweigenden Auftrages seitens des Kontoeigentümers (standing order) finden – wenn wir gerade geschäftliche Elemente suchen wollten – das ist jedoch nicht bezeichnend für die in diesem Kreise durchgeführten Bankoperationen. Wie wir schon sagten, bei diesen Banktätigkeiten ist das verwaltungsrechtliche Gepräge vorherrschend, das durch die Möglichkeit der Verhängung einer Buße im Falle der unbegründeten Rückerstattung unterstützt wird.

Es muß noch erwähnt werden, daß das Promptzahlungsverfahren als Zahlungsart in dem Warenverkehr der RGW-Länder nicht ausschließlich ist. In diesem System wird im allgemeinen der Gegenwert der Lieferungen innerhalb der verbindlichen Kontingente beglichen. Die Außenhandelsorgane der sozialistischen Staaten schließen jedoch oft Geschäfte außer diesem Bereich ab, so häufig zum Zweck des Reexports. Bei der Abwicklung des Reexportgeschäftes nach einem kapitalistischen Land ist es sehr wichtig, daß das Außenhandelsunternehmen, das den Gegenstand des Reexportgeschäftes vom anderen sozialistischen Staat importiert, zur Zeit und unbedingt die zum Export benötigten Dokumente erhält. Diese erhöhte Sicherheit wird durch die Stipulierung des Akkreditivs gewährt, das in solchen Fällen eigenartigerweise nicht im Interessen des Verkäufers, sondern in dem des Käufers steht.

b) *Multilaterales Zahlungssystem.* Das in den Allgemeinen Lieferbedingungen festgelegte bilaterale Zahlungssystem dient als Grundlage für das darauf gebaute *multilaterale Verrechnungssystem* der RGW-Banken.

Die Vertreter der RGW-Staaten haben 1963 ein Abkommen unterzeichnet über das multilaterale Verrechnungssystem das in transferierbarem Rubel abgewickelt wird, und über die Errichtung der Internationalen Bank für die Wirtschaftliche Zusammenarbeit. (Bei uns promulgiert in der Gesetzverordnung Nr. 2.v.J.1968)

Nach dem Abkommen erfolgen nach dem 1. Jänner 1964 alle Verrechnungen aus zwei- oder mehrseitigen Vereinbarungen bezüglich gegenseitiger Warenlieferungen, ferner aus Einzelkontrakten, sowie anderen Zahlungsabmachungen in transferierbarem Rubel. Der Goldgehalt des *transferierbaren Rubels* wurde mit 0,987412 g purem Gold festgesetzt. Jeder Vertragspartner kann seine Mittel auf dem transferierbaren Rubelkonto für den Zweck der Verrechnung mit den anderen Vertragspartnern frei verwenden.

In demselben Abkommen haben die vertragsschließenden Parteien die Gründung der erwähnten gemeinsamen Bank beschlossen, mit dem Ziel, die wirtschaftliche Zusammenarbeit zwischen den sozialistischen Staaten, und dadurch ihre eigene Volkswirtschaft weiterzuentwickeln, ferner die handels- und wirtschaftliche Verbindung zwischen ihrem eigenen Land und anderen Ländern und die Ausdehnung ihrer wirtschaftlichen Beziehungen zu fördern. Die Satzung der Bank bildet einen ergänzenden Teil des Abkommens. Die neugegründete Bank hat den Namen: *Internationale Bank für die Wirtschaftliche Zusammenarbeit* („Meschdunarodnüj Bank Ekonomitscheskogo Sotrudnitschestwa", „International Bank of Economic Cooperation, des weiteren: Bank). Ihr Sitz ist Moskau.

Der Aufgabenkreis der Bank besteht aus folgenden Funktionen:

a) die Abwicklung der *multilateralen Verrechnungen* in transferierbarem Rubel;

b) *Kreditgewährung* in Verbindung mit den Außenhandels- und anderen Operationen der Mitgliedsstaaten;

c) Anschaffung von freien Mitteln und Aufbewahren in *transferierbarem Rubel;*

d) Sammeln von *Gold, frei konvertierbaren und anderen Devisen* auf Rechnungen und als Einlage von den Mitgliedsstaaten und anderen Ländern, und mit diesen Mitteln Durchführung von *Bankoperationen;*

e) Durchführung von *anderen* den Aufgaben der Bank entsprechenden Bankoperationen;

f) die *Finanzierung* des gemeinsamen Baus der Rekonstruktion und Inbetriebhaltung von Industriebetrieben und Anlagen aufgrund des Auftrages der interessierten Länder zu Lasten der abgesonderten Quellen dieser Länder.

Das *Grundkapital* der Bank beträgt 300 Millionen transferierbare Rubel, dem die Vertragspartner mit einer aufgrund ihres Exportvolumens im gegenseitigen Handel errechneten Quote beitragen. (Die Quote Ungarns beträgt 21 Millionen transferierbare Rubel.) Das Abkommen sieht die Bildung eines Teiles des Grundkapitals in *Gold* oder frei *konvertierbaren* Devisen vor. In diesem Sinne wurden 1966

30 Millionen, 1971 weitere 30 Millionen transferierbare Rubel eingezahlt. Außer dem Grundkapital hat die Bank ein Reservekapital und sie kann auch spezielle Fonds haben.

Ein Teil des Aufgabenkreises der Bank kann nur stufenweise verwirklicht werden, da der ausgebreitete internationale Ausbau der Bankverbindungen eine längere Zeit benötigt. Die direkt bevorstehende, primäre Aufgabe der Bank demgegenüber ist die *Abwicklung der vielseitigen Verrechnungen der RGW-Länder.*

Die Verrechnungen werden auf den *transferierbaren Rubelkontos* abgewickelt, die die Banken der Mitgliedsstaaten bei der Bank eröffnen. Die Banken der Mitgliedsstaaten senden täglich ein Aviso von der Summe ihrer Forderungen (Einnahmen), bzw. ihrer Zahlungen zugunsten der Exporteurbank, und geben der Bank den nötigen Auftrag zur Durchführung der entsprechenden Verrechnungsoperation (Gutschrift, Belastung). Als Erfolg dessen bekommen die Banken der Mitgliedsstaaten den Gegenwert der Warenlieferungen der Außenhandelsunternehmen, sowie den Gegenwert anderer Posten – z. B. Transportabrechnung, der Unterhalt von Botschaften, Stipendien, Studienreisen, – auf ihrem transferierbaren Rubelkonto. Jeder Staat hat eine der Bank gegenüber bestehende Forderung, die er *nach Belieben jederzeit gegen jeden, an dem Vertrag beteiligten Staat* verwenden kann. Dies bietet die Möglichkeit, daß der Gegenwert der Warenlieferungen, die ein Staat seinem Partner gegenüber durch Lieferungen nicht mehr begleichen kann, mit in anderen Staaten gekauften Waren ausgleicht. Das führt natürlich zur Erweiterung des zwischenstaatlichen Handels, wir müssen jedoch betonen, daß die multilaterale Verrechnungsordnung nur ein Hilfsmittel dessen darstellt.

Im Rahmen der Abwicklung der multilateralen Verrechnungen gewährt die Bank Kredite in transferierbarem Rubel den einzelnen Ländern bzw. den Banken der Länder nach den diesbezüglich festgelegten Regeln. Ein solcher Kredit ist vor allem der *Verrechnungskredit,* den die Bank in dem Fall gewährt, wenn es an irgend einem Konto vorübergehend kein genügendes Mittel zur Deckung des Gegenwertes der Waren und Dienstleistungen, sowie der Kosten anderer, mit dem Warenverkehr verbundenen anderen Operationen zur Verfügung steht. Der Bankrat stellt die obere Grenze des so zu gewährenden Kredits in einem Prozentsatz des Warenverkehrs fest. Dieser Verrechungskredit ist vom „revolving" Gepräge, in dem Sinne, daß es zur Abwicklung der Verrechnung unverzüglich gewährt wird, in jedem Falle jedoch innerhalb des festgestellten Limits.

IV. Weiterentwicklung der Vereinheitlichung

1. Die im gegenseitigen Einvernehmen erfolgte Regelung des bilateralen Zahlungssystems (1958), dann die multilaterale Entwicklung dessen (1964) waren sehr bedeutende Schritte in der Richtung der Ausweitung des Handels zwischen den sozialistischen Ländern, sie haben jedoch nicht alle Probleme gelöst – nicht einmal innerhalb der sozialistischen Welt.

Die Weiterentwicklung ist notwendig insbesondere in der Richtung, daß zwischen dem in den ALB ausgestalteten Zahlungsautomatismus einerseits und den Zahlungsmechanismen der sozialistischen Länder, die in den letzten Jahren ein neues Wirtschaftslenkungssystem eingeführt haben, größerer Einklang gewährt werde. In unserem Lande wurde z. B. seit 1968 bei den finanziellen Abrechnungen zwischen den Unternehmen anstatt des früheren Inkassosystems die Verrechnungsart der *Überweisung* (die auf die Initiative des Verpflichteten, bzw. des Käufers in Bewegung gesetzt wird) vorherrschend, weil diese Art der Verrechnung mit den neuen Vertragsformen der Abwicklung des Produktenverkehrs im neuen Wirtschaftsmechanismus vielmehr im Einklang ist. Außer Ungarn haben mehrere sozialistische Länder diese Verrechnungsart in den Vordergrund gestellt, bzw. die Regelung geht diesen Weg.

Zwischen dem *Überweisungssystem,* das bei den Verrechnungen der Unternehmen laut innerstaatlicher Regelung gewisser RGW-Staaten als Hauptverrechnungsform erscheint, und dem *Promptinkassosystem* der Allgemeinen Lieferbedingungen, das bei den Verrechnungen zwischen verschiedenen Staaten obligatorisch anzuwenden ist, zeigt sich ein Unterschied grundsätzlichen und praktischen Charakters, der in je einem Lande bei den Abrechnungen der Unternehmen und der Kreditierung gewisse Schwierigkeiten verursacht. Um ein Beispiel zu nennen: im neuen System der Wirtschaftslenkung ist es laut Kreditgewährungsregel eine Vorbedingung der Erfüllung des Devisenanspruchs des importierenden Unternehmens, daß es den Forint-Gegenwert deponiere. Im Falle des Imports aus RGW-Staaten ist diese Regel in dieser Form nicht verwendbar, – nach der dargelegten RGW-Regelung wird ja der Zahlungsauftrag der Bank nicht vom Importeur gegeben, sondern der Lieferant im anderen Staate bekommt sein Geld gleich nachdem die Ware auf den Weg gebracht wurde, und die Bank des einheimischen Importeurs wird mit dem Gegenwert gleich belastet. Der Importeur selbst zahlt also erst viel später, als der Verkäufer den Gegenwert bereits bekommen hat. Solche und andere Erwägungen beachtend würde es als richtig erscheinen – und in dieser Richtung sind gewisse Anfangsschritte unternommen worden – daß die starre Regelung bezüglich der bilateralen Abrechnung der ALB-Staaten *revidiert werde.*

2. Die Weiterentwicklung des Zahlungssystems der einzelnen sozialistischen Staaten steht als Zielsetzung auch auf dem Programm der *sozialistischen Wirtschaftsintegration,* des näheren in dem durch die Mitgliedsstaaten 1971 akzeptierten *Komplex-Programm.*

Eine Vorbedingung der Verwendung der Waren- und Geldverhältnisse im breiteren Kreise im Rahmen der sozialistischen Integration besteht in der Einführung der Konvertibilität der nationalen Währungen, bzw. deren Umwechselbarkeit in eine *Kollektive Währung.* Diese schwere Aufgabe kann natürlich nicht gleich, über Nacht gelöst werden. Die inneren Preise der Länder sind heute nicht gleich, nicht einmal proportioniert, so ist auch die Kaufkraft der Währungen verschieden, und man muß zwischen den Außen- und Binnenhandelspreisen eine „Brücke" er-

richten: zu den Umrechnungskursen wurden – im Abkommen – spezielle Nachlässe oder Zulagen *(„Koeffiziente")* festgelegt. Das System der gegenseitig abgestimmten Umrechnungskurse, sowie – perspektivisch – die kollektive Währung und die gegenseitige Konvertibilität der nationalen Währungen sind wesentliche Elemente der Verwirklichung der sozialistischen wirtschaftlichen Integration.

Im Rahmen des Komplexprogramms untersuchen die Mitgliedsstaaten in regelmäßigen Zeitabständen die Frage der Sicherung der Realität des Umrechnungskurses und Goldgehaltes der kollektiven Währung.

Sie arbeiten ferner Maßnahmen für die Ausbreitung der multilateralen Verrechnungen mit der Hilfe von kollektiver Währung aus, und führen diese Maßnahmen bezüglich jeder Art der gegenseitigen Außenhandelsverbindungen aus. Weitere Maßnahmen werden im Interesse der Ausweitung der vielseitigen Ausgleichung des Warenverkehrs zwischen den RGW-Mitgliedsstaaten ausgearbeitet. Zu diesem Zweck müssen die kurz-, mittel- und langfristigen Kreditierungssysteme der Internationalen Bank für die Wirtschaftliche Zusammenarbeit und der Internationalen Investitionsbank weiterentwickelt werden. Ein Ziel ist auch *Drittländer* – vor allem von den sozialistischen und Entwicklungsländern – in das multilaterale Verrechnungssystem, das aufgrund der kollektiven Währung abgewickelt wird, einzubeziehen.

Zwecks perspektivisch möglicher Einführung der gegenseitigen Konvertibilität der kollektiven Währung haben die RGW-Mitgliedsstaaten – wie wir erwähnt haben – den ökonomisch begründeten und gegenseitig abgestimmten *Umrechnungskurs* ihrer nationalen Währungen festgelegt, und werden diesen sowie die Umrechnungsschlüssel *(Koeffiziente)* zur kollektiven Währung im weiteren verfeinern. Dazu ist jedoch notwendig, daß die Länder, ihrer eigenen Gegebenheiten und Möglichkeiten gemäß, die Fragen der Verbindung zwischen inländischen Erzeugerpreisen und Außenhandelspreisen entsprechend lösen können.

Über die *Einführung des abgestimmten Umrechnungskurses der nationalen Währungen* sowie über Zeitpunkt der Einführung werden die Mitgliedsstaaten 1980 entscheiden.

Die Mitgliedsstaaten erhalten vorderhand die Ordnung der *nichthandelsmäßigen Zahlungen* aufrecht – unter Beachtung der Unterschiede der Erzeuger- und Konsumentenpreise, sowie der Preisproportionen. Zu diesem System werden die vereinbarten Zulagen (Nachlässe) zu den offiziellen Umrechnungskursen, wie auch die Umrechnungskoeffiziente verwendet. Im Interesse der Gleichwertigkeit der Verrechnungen führen die Mitgliedsstaaten von Zeit zu Zeit die Konkretisierung und nötigenfalls die Abänderung der Zulagen (Nachlässe) und Koeffiziente durch. Es wird im Einklang mit den Preisänderungen und anderen Bedingungen vorgenommen, unter anderem in dem Fall, da die innerstaatlichen Preisänderungen die durch die interessierten Staaten gemeinsam festgelegten Grenzen überschreiten.

Die RGW-Staaten studieren zur gleichen Zeit die Möglichkeit, daß sie perspektivisch – von der Behebung der heutigen wesentlichen Unterschiede der Er-

zeuger- und Konsumentenpreise und der Preisproportionen abhängig – sich auf die Abwicklung der Verrechnungen *aller Zahlungen zu dem einheitlichen Umrechnungskurs der Währung eines jeden Staates umstellen.*

3. Die RGW-Mitgliedsstaaten haben in der Richtung der Ausgestaltung ihres einheitlichen internationalen Zahlungs- und Finanzsystems zweifellos wesentliche Schritte getan. Diese wichtigsten Schritte waren: die Regelung der Warenlieferungen in den ALB (1958), die Einführung des multilateralen Verrechnungssystems (1964) die Errichtung der Internationalen Bank für die Wirtschaftliche Zusammenarbeit (1964) und der Internationalen Investitionsbank (1970), dann die Vereinbarung bezüglich zukünftiger Einführung der *sozialistischen kollektiven Währung* und Prüfung anderer Währungs- und Finanzfragen (1971). Was den anderen Teil der Welt betrifft: heute sind nunmehr beinahe 100 Staaten Mitglieder des durch die entwickelten kapitalistischen Staaten in dem International Monetary Fund und in anderen Institutionen ausgestalteten internationalen valutären Kooperationssystems. Obgleich zwischen den zwei großen Finanzsystemen, richtiger: deren Organen gewisse Beziehungen vorhanden sind (so z. B. die Möglichkeit der Operationen mit frei konvertierbaren Währungen in der Internationalen Bank für die Wirtschaftliche Zusammenarbeit), können wir heute noch keinesfalls von einer organisierten Zusammenarbeit auf diesem Gebiet sprechen. Der Fortschritt der wirtschaftlichen *Integrationsbestrebungen* an beiden Seiten der Welt, ferner die rapide Entwicklung der internationalen Handels- und anderen wirtschaftlichen Verbindungen machen die Untersuchung der Möglichkeiten der *finanziellen Zusammenarbeit* zwischen „Ost" und „West" immer mehr aktuell, und in der nationalökonomischen und rechtlichen Literatur der letzten Jahre werden diese Fragen immer intensiver erörtert.[4]

Die Errichtung eines *einheitlichen internationalen Finanzsystems* zwischen Ländern, die grundverschiedene wirtschaftlich-politische Systeme haben, ferner auf sehr verschiedenen Stufen der wirtschaftlichen Entwicklung stehen, ist heute nur noch mehr im Stadium der theoretischen Analyse; dies bedeutet jedoch keinesfalls, daß es sich nicht lohnen würde bis zur Errichtung des erhofften „idealen" universellen Systems, das heute noch dem Wert der Utopien angehört, die *praktischen Möglichkeiten der Zusammenarbeit* – wenn auch auf Teilgebieten – im Interesse von je mehr Ländern und Instituten zu suchen.

Die Möglichkeiten der breiteren oder engeren Zusammenarbeit werden unter anderem auch dadurch behindert, daß die zwei internationalen Finanzsysteme

[4] Von ungarischen Verfassern: BÁCSKAI, I.: *Magyarországnak a nemzetközi munkamegosztásba való bekapcsolódását elősegitő monetáris eszközök* (Monetäre Mittel zur Förderung der Einschaltung Ungarns in die internationale Arbeitsteilung). Bankszemle, 11/1971. LÁSZLÓ A.: *Monetary policy – a help to fostering international cooperation.* In: Convertibility, multilateralism and freedom. Wien, New York, 1972; FEKETE, J.: *A nemzetközi valutarendszer és a kelet – nyugati gazdasági kapcsolatok néhány összefüggése* (Das internationale Währungssystem und einige Zusammenhänge der Ost-West Verbindungen der Wirtschaft.) Pénzügyi Szemle, 5/1972.

(Zahlungs-, monetäre, valutäre Systeme) – wenn wir in großen Zügen von zwei Systemen sprechen – noch auch auf ihrem eigenen, beschränkten Gebiet keinesfalls vollendet genannt werden können. Es sind die Schwierigkeiten bekannt, die die westliche, auf die Abkommen von Bretton-Woods sich gründende valutäre Zusammenarbeit meistern muß, und wir waren bereits mehrmals Zeugen von Krisenerscheinungen, die die Seinsgrundlage des ganzen Systems gefährdet haben. Die im vorhergehenden dargelegten, bisher verwirklichten gemeinsamen Institute der sozialistischen finanziellen Zusammenarbeit haben sich jedoch auch nicht derartig gestaltet, daß man sie nicht weiterentwickeln könnte und müßte. (Wir haben auf einige konkrete Probleme oben hingewiesen.) Neben diesen bereits errichteten Instituten gibt es zahlreiche solche Gebiete, wo wir den Mangel oder zu primitive Form der Zusammenarbeit mit Recht beanstanden können.

Die internationale valutäre Zusammenarbeit ist berufen den internationalen Verkehr von Waren, Dienstleistungen, Produktionsfaktoren zu fördern, und zwar im Interesse einer neuen vernünftigen internationalen Arbeitsteilung. Die Ausgestaltung einer solchen Zusammenarbeit ist nur aufgrund der gleichberechtigten Beziehungen der Länder der Welt, unter Beachtung der spezifischen Umstände, die sich aus der wirtschaftlichen Entwicklung, vom gesellschaftlich-wirtschaftlichen System der einzelnen Länder ergeben. Das auf dem gesellschaftlichen Eigentum der Produktionsmittel und der volkswirtschaftlichen Planung beruhende Wirtschaftssystem der sozialistischen Länder soll eines der bestimmenden Elemente der Ausgestaltung eines *universellen Finanzsystems* sein. Es muß beachtet werden, daß die Konvertibilität bei dem Entwickeln der internationalen Finanzen nur differenziert und stufenweise geltend gemacht sein darf.

Das „komplexe Programm" der RGW-Länder, das wir gleichfalls erwähnt haben, beachtete diese Gesichtspunkte als es die Zielsetzungen auf dem Gebiet der valutär-finanziellen Zusammenarbeit festgelegt hat. Eines der wichtigen Elemente dazu stellt die *kollektive Währung* dar, die durch Weiterentwicklung des transferierbaren Rubels zu begründen ist.

Die Verwirklichung eines Finanzsystems, das die *ganze* Welt, darin die Staaten der zwei verschiedenen gesellschaftlich-wirtschaftlichen Systeme universell umfassen würde, ist nur mit der bewußten Beachtung der gegenseitigen Interessen vorstellbar, das natürlich eine komplizierte, keinesfalls von heute auf morgen durchführbare Aufgabe ist. Die Grundlage dieses Systems, „die Schlüsselwährung" kann offensichtlich nicht eine durch Machtmittel eines Staates ausgebaute Währung sein, sondern nur ein national „neutrales" und international kontrolliertes Reservemittel, das durch Abstimmung der gegensätzlichen Interessen ausgestaltet wird, kann imstande sein, die Vollendung des internationalen Finanzsystems und dadurch die internationale Arbeitsteilung fördern. An der Tagung der UNCTAD 1972 haben die Sowjetunion und acht sozialistische Staaten die Einberufung einer Weltkonferenz mit dem Ziel der Reformierung des Währungssystems vorgeschlagen.

Efforts to facilitate international payments

by

I. MEZNERICS

With the high level of development of international trade and its trend of rapid extension, the economic and legal problems connected with the elimination or at least reduction of the circumstances preventing the trouble-free execution of trade relations and the respective payments *(international payments)* come more and more into the foreground. Among the afore-mentioned problems the taking into consideration of the restrictions resulting from *customs* and *exchange* regulations and regarded as a factor making difficult the development of international trade has obtained an important place for some decades. The efforts and objectives aiming at the elimination or attenuation of the restrictions concerned resulted in this field in the coming into existence of international documents operating on world-wide scale such as, among others, the *Bretton Woods* Agreement (1944) or the General Agreement on Tariffs and Trade (GATT, 1947).

In the study the efforts aiming at the facilitation of *international payments* and the achievement so far realized are dealt with. Following the analysis of the legal nature of the bilateral and multilateral clearing, and other, agreements regulating payments, concluded with a view to prevent *obstacles* in the field of *exchange rules,* the activity of UNCITRAL, i.e. a UN standing committee set up for this particular task, carried out favouring the unification of law in order to facilitate international payments, is described. The purpose of this activity has been, first and foremost, to draft a new and *unified code of bills,* destined to be used in international trade, and to let it accepted all over the world. The other part of this legal unification work, bearing upon international payments and of *universal* character, and concerning the improvement of the uniform rules of the *letters of credit,* i.e. a way of payment, generally applied in international trade, on the one hand, and the putting down of the unified rules of *guarantees* as usual in international trade, on the other hand, is being carried out under the auspices of the *International Chamber of Commerce* (ICC), with its headquarters in Paris, and with the participation of the representants of almost every country of the world, i.e. the delegates of banks including, of course, those of the banks of the socialist states.

Taken as a successful example of the *regional* unification of law, the stipulations concerning the *uniform system of payments* of the *"General Conditions of Delivery"*, i.e. a uniform law of sales and purchases, accepted by all member states of the CMEA (Comecon) and applied successfully by them in the realization of their international trade as long as since 1958, and the role of the common bank of the socialist countries, the *International Bank for Economic Co-operation,* with its headquarters in Moscow, in effecting international payments, are presented and subjected to a theoretical analysis as well.

Finally, some ideas bearing upon the investigation of the chances and conditions of an east-west *co-operation* in the field of *finances and exchanges* are outlined.

Стремления к облегчению международных платежей

И. МЕЗНЕРИЧ

Помимо высокого развития и стремительного роста международной торговли всё более выдвигаются на первый план экономические и юридические вопросы устранения или же уменьшения условий, препятствующих простому осуществлению торговли и связанных с ней платежей *(международных платежей)*. Среди этих вопросов десятилетиями значительное место занимает обсуждение ограничения, вытекающего из *пошлин* и регулирований в области *валютного права,* и являющегося фактором, препятствующим развитию международной торговли. В этой области стремления к прекращению или смягчению скованностей в мировых масштабах появились в таких международных документах, как, между впрочим, *Бреттонвудское* соглашение (1944) или ГАТТ (Генеральное соглашение по тарифам и торговле — 1947).

В настоящей статье излагаются стремления к облегчению *международных платежей* и до сих пор достигнутые результаты. После изучения правовой природы двусторонних и многосторонних соглашений о клирингах и других платежах, имеющих целью устранить *валютно-правовые* препятствия, автор излагает деятельность созданной для этой цели постоянной комиссии ООН (ЮНСИТРАЛ) по унификации права в целях облегчения международных платежей, которая направляется, в первую очередь, на создание нового, *единого закона о векселях*, предназначенного для пользования им в международной торговле, а также на проведение его во всём мире. Другая часть унификации права универсального характера, относящейся к международным платежам (которая направляется, с одной стороны, на дальнейшее развитие единых правил общеупотребительного в международной торговле способа платежа: *аккредитива*,и на создание единых норм *гарантий*, употребительных в международной торговле), происходит в *Международной торговой палате* при участии почти всех стран мира (и банков, в том числе и банков социалистических стран).

В качестве яркого примера *региональной* унификации права показывается и теоретически изучается автором часть единого права купли-продажи, принятого под названием «*Общие условия поставок*» всеми странами-членами СЭВ и успешно применяемого с 1958 года при проведении товарооборота между странами-членами СЭВ, которая относится к *единой системе платежей*, а также изучается роль общего социалистического банка (*Международного банка экономического содружества*), выполненная при проведении многосторонних платежей.

Наконец автор выдвигает несколько вопросов об изучению возможностей и условий *валютно-финансового сотрудничества* Запада и Востока.

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Types, Branches et Formes Cooperatifs

par

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L'une des questions fondamentales de la théorie coopérative et du droit coopératif est la typisation des coopératifs. Sur ce thème se portent de vives discussions tant dans le pays (MM. *Erdei, Gyenes, Hegedüs, Molnár*), *que dans les pays étrangers* (MM. *Fichette, Vienney*). La typisation présente une importance de plusieurs aspects; ainsi de la documentation de la liberté des types coopératifs, l'élaboration des règles générales et spéciales coopératives, la formation de la terminologie adéquate etc.

Du point de vue théorique l'on peut approcher de plusieurs manières de la classification des coopératives en dépendance du fait, quelle partie nous choisissons et élevons au grade déterminant. En premier lieu nous examinerons les rapports *de la coopérative et du membre,* notamment le rôle rempli par la coopérative dans les conditions de vie du membre de la coopérative et, inversement, l'activité du membre de la coopérative en quelle mesure influence la coopérative. Comme un deuxième point de vue nous analyserons *la structure microéconomique de la coopérative,* notamment que les rapports précédents quelle formation économique engendrent et quelle est la position du membre dans cette formation économique et enfin on ne peut pas négliger non plus l'examen de la sphère macroéconomique. Sous ce rapport nous rechercherons que la coopérative *dans quelle sphère de la reproduction sociale* se place et, en conséquence, quelle est le caractère de l'activité de la cooperative.

Conformément à ce que nous venons d'exposer ci-dessus, en Hongrie l'on peut distinguer trois types des coopératives: coopératives de production, coopératives de logement et coopératives de consommation.

A l'intérieur des types les coopératives se divisent suivant des *branches.* Il est univoque que la coopérative agricole de production constitue en même temps une branche autonome. La coopérative industrielle est considérée par l'opinion générale comme une branche, mais la réalisation conséquente de la manière de voir de la direction par branche exigerait la division suivant les branches de l'industrie. Les coopératives de consommation se divisent en deux branches: ce sont les coopératives de consommation et de commercialisation (dont l'abbréviation en hongrois est: ÁFÉSZ) qui ont un caractère de commerce marchandise; et les coopératives d'épargne de caractère de coopérative de crédit.

A l'intérieur de la branche on distingue aussi suivant la forme; les formes des coopératives agricoles sont les suivantes: la coopérative de production agricole, la coopérative des pêcheurs, ainsi que le groupement agricole spécialisé. Les coopératives industrielles englobent: les coopératives de production industrielles et les coopératives d'industrie domestique. Les coopératives de logement comprennent: la coopérative des propriétaires de logement, la coopérative d'entretien de logement, les coopératives de villégiature et les coopératives de garage.

1. Les caractéristiques de la typisation

1. L'une des questions fondamentales de la théorie coopérative et du droit coopératif est la systématisation des coopératives; la typisation des coopératives. Dans la littérature d'économie politique et de théorie coopérative se portent depuis longtemps des discussions sur ce thème. La science du droit coopératif n'a examiné cette question que « per tangentem »; elle *ne pouvait constituer non plus* un thème de

recherche pour le droit de coopérative de production agricole, parce que cette branche de droit se reliait à une branche d'un type coopératif. La littérature de droit – surtout la littérature de droit bourgeoise – la législation, ainsi que la pratique utilisaient longtemps, et utilisent maintes fois à l'heure actuelle aussi de manière mélangée ces expressions: type, genre, branche, formation, forme, en les traitant comme notion synonyme dans beaucoup de cas. L'inévitabilité de la typisation s'est présentée avec une exigence plus grande au cours des travaux préparatoires de la loi uniforme sur les coopératives. La première étape de la codification coopérative actuelle s'est fermée en 1971, il reste encore la création du décret-lois sur les coopératives de logement et d'épargne – et cette législation, respectivement la littérature de l'enseignement juridique en adoptant la proposition terminologique de l'auteur[1], ont systématisé ces termes par l'introduction des catégories *type, branche* et *forme.* Néanmoins, nous croyons que par cela le thème ne soit aucunement épuisé et fermé. Cela en conséquence de deux motifs: d'une part cette division ne s'est pas encore répandue dans la littérature même, d'autre part elle ne s'est pas encore cristallisée d'une manière *univoque,* que les notions type, branche et forme quels rapports réels couvrent.[2] Cette étude – après l'analyse des traits communs des coopératives, sans l'exigence de considérer fermé le problème, mais en tenant nécessaire les éclaircissements futurs – essayera la systématisation de la « richesse des formes coopératives » hongroises, l'élaboration de « differentia specifica » des coopératives.

L'on doit poser tout d'abord la question si du point de vue du droit la classification des coopératives ont une importance, et, en cas affirmatif, pour quels raisons. La classification a de portée, pour plusieurs raisons.

a) Aux termes de la Constitution et de la Loi N° III de l'an 1971 sur les coopératives (par la suite: L.C.) la Hongrie connaît *la liberté d'association.* Aux termes de l'article 10 al. (1) « l'État soutient le mouvement coopératif fondé sur l'association libre des travailleurs », respectivement aux termes de l'art. 3 de la L.C. « la République Populaire Hongroise reconnaît la liberté de la coopération visant une activité économique exempte de l'exploitation ». Enfin, aux termes de l'art. 37 de la L.C. « la coopérative est habilitée de déployer toutes les activités économiques non interdites ou réservées par la loi, le décret-loi ou le décret (une résolution) gouvernamental aux organes économiques de L'État ». En d'autres termes, l'on peut constituer en Hongrie des coopératives pour la réalisation des objectifs très variés. Suivant la formulation de M. *Nyers,* la liberté de l'association constitue un principe fondamental dans

[1] NAGY, L. *Az új gazdasági mechanizmus és a szövetkezeti jog továbbfejlődésének elvi, kodifikációs és gyakorlati kérdései* (Les problèmes de principe, de codification et pratiques de la nouvelle direction de l'économie et du perfectionnement du droit coopératif). Magyar Jog, 6–7/1969. p. 393. FÖLDES–MOLNÁR–SERES–VERES: *Termelőszövetkezeti jog* (Droit de la coopérative de production). Manuel. Budapest, 1970, p. 29.

[2] Par exemple PÁL, J. écrit sur « les types des coopératives de logement » dans son étude intitulée: « Lakáspolitika – lakásszövetkezetek » (« Politique de logement – coopératives de logement »), ouvrage digne par ailleurs de beaucoup d'attention, traitant les questions du movement coopératif de logement hongrois de façon comparative avec les problèmes de coopérative de logement d'autres pays. SZKI Közlemények, 1971/80.

les rapports de l'État socialiste et des coopératives, principe qui s'est fait méritoire par la réforme économique de l'an 1968, en conséquence du fait qu'elle ne limite pas, ne « profile » pas d'une manière rigide l'activité des coopératives.[3] Dans nos conditions, la liberté de la coopération a un double sens: la création de droit hongroise garantit par la loi *en général* la liberté de la coopération et à l'intérieur de cela – faute d'une meilleure expression – la liberté *de type de l'association.* La première n'a qu'une seule limite, que l'activité coopérative ne peut pas conduire à l'exploitation, la dernière – dans nos conditions – en a deux: on ne peut constituer des coopératives qu'au but économique : l'on ne peut pas fonder des coopératives des avocats ou des musiciens, et également on ne peut pas former des coopératives en vue de l'accomplissement des tâches exclusivement étatiques. Dans certains pays socialistes, en Pologne p.e., l'on peut créer des coopératives aussi en dehors de la sphère économique. (Coopérative de culture populaire, coopérative sanitaire etc.).[4] Profitant des possibilités, de la liberté de type, en Hongrie s'est formé aussi jusqu'à présent un système très varié des coopératives, et l'évolution n'est pas encore fermée.

La liberté de l'association est au fond de même âge que notre régime socialiste. La liberté de type même est la conséquence directe de l'attitude politique qui a déclaré la possibilité et l'exigence de l'élargissement du rôle et de la sphère d'activité des coopératives. « L'État protège l'établissement des formations coopératives, dans lesquelles les nécessités de production, de consommation et les autres nécessités de la population peuvent être satisfaites avec des investissement relativement petits, dans des organismes d'entreprise petite et moyenne».[5] *La classification des coopératives est de portée avant tout du point de vue de l'appréciation de principe des rapports existant entre la coopérative et les conditions économiques, sociales et politiques qui l'entourent.*

b) Le système varié de la coopérative hongroise embrasse la sphère large des relations de la production sociale, et les différentes formations coopératives se placent sur des différents points du cycle du processus de reproduction sociale. Il est donc compréhensible, que la portée de la typisation a avancé au premier plan surtout au cours de la codification dans le domain coopératif qui a eu lieu dans les dernières années, et ce n'est pas un fait du hasard que l'une des questions de la codification qui revient toujours était précisément le rapport des coopératives et des ministères de branche (le Ministère de l'Agriculture et de l'Alimentation, le Ministère du Commerce Intérieur etc.) s'acquittant de la direction de principe des différentes

[3] NYERS, R.: *Vita közben* (Au cours de discussion). (Voir: CSIZMADIA–MOHAROS–NAGY–ROMHÁNY: *Szövetkezetpolitikai kérdések* (Problèmes de la politique coopérative). Budapest, Kossuth Kiadó, 1970. p. 137.

[4] En 1970 ont fonctionné en Pologne 314 coopératives sanitaires avec 115.000 membres. Ces coopératives desservies par 540 médecins, 38 techniciens sanitaires et 373 sœurs. Cf.: KOWALAK, T.: Кооперация в народной Польше (La coopérative en Pologne populaire). ZW CRS. Warszava 1972.

[5] *A gazdasági mechanizmus reformja* (La réforme de la direction de l'économie nationale). Le matériel de la séance de 25–27 mai 1966 du Parti Ouvrier Socialiste Hongrois. p. 221. CSIZMADIA–NAGY–MOHAROS–ROMHÁNY: op. cit. p. 119.

coopératives. Au cours des travaux de codification est ressorti en effet que, entre la structure de branche de l'économie populaire et la richesse de forme des coopératives (respectivement, à l'intérieur de cela, la sphère de leur activité) n'existait pas toujours une harmonie complète. Ce fait a conduit à des troubles non seulement dans l'exercice du droit de surveillance étatique de la légalité, mais a également prêté à des malentendus dans l'acception de l'activité des différentes coopératives. Cette situation s'explique également – en dehors de la survivance des certaines règles de droit coopératives des années cinquante – peut-être par le fait que sous le rapport de la typisation des coopératives la théorie n'a pas préalablement fourni non plus assez de munitions pour la codification en matière de la typisation des coopératives. Enfin, comme l'on sait, la codification – qui se reposait sur l'unité et sur la différenciation des coopératives – s'est également chargée sous plusieurs rapports à un important travail de précurseur. S'est éclairci d'un part que l'object de la direction de branche n'est pas la coopérative, mais *son activité économique;* en cas de profil mixte donc tous les ministères intéressés exercent les tâches résultant de la direction de branche, et la codification a surmonté d'autre part les tâches difficiles provenant de la rédaction de la loi uniforme sur les coopératives et a également élaboré *le principe de branche* de la création de droit coopérative. Comme un résultat de cette manière de voir de la codification, la loi uniforme sur les coopératives s'est complétée d'une manière organique par des règles coopératives de branche à l'échelon de décret-lois, et en même temps les rapports des différentes formes coopératives se sont régularisés en général par des règles à l'échelon de gouvernement. On peut déduire en général la conséquence suivant laquelle si une forme de coopérative atteint le niveau de branche, *elle peut exiger la réglementation de ces conditions de vie à l'échelon de la loi.* En même temps, la prudence du législateur est marquée par le fait qu'il a réglementé à un échelon plus bas – quasi d'une manière provisoire – quelques activités coopératives, dont la qualité de branche est encore discutable. Donc, il ne doit pas nous éloigner très loin pour déduire la conclusion que: *la classification adéquate au contenu des coopératives exerce un effet déterminant sur le système de codification des coopératives et à l'intérieur de cela au rapport de la direction de branche et des coopératives.*

c) La direction embrassant l'ensemble de la vie économique est assurée par la politique économique de l'État socialiste, celle des domaines partiels est assurée par la politique sectoriale. Les coopératives ne peuvent pas se soustraire non plus à l'effet de la politique économique générale et de la politique de branche, puisque les coopératives font partie organique de l'économie nationale. D'autre part, la direction sectoriale doit assurer que les intérêts des coopératives se réalisent conformément à leur portée sociale et poids économique. La typisation des coopératives favorise le placement des différentes coopératives au sein du même système, à l'intérieur de la politique économique, respectivement de la politique économique sectoriale, ou bien favorise la formation de la politique coopérative différenciée. En d'autres termes, la typisation des coopératives, c'est-à-dire la systématisation du type, de la

branche et de la forme réagit d'une façon positive *à la formulation et à l'efficacité des principes coopératives,* et parce que les principes coopératives sont également les principes du droit coopératif, elle réagit au contenu normatif des différentes règles de droit coopératives. Ainsi, il est évident que le principe du *caractère volontaire* doit être élargi par les exigences de la liberté du type; la structure de branche fait plus précise la formulation concrète du rapport de l'État et des coopératives s'exprimant en particularités générales et de branche, la systématisation de la richesse des formes permet d'approcher d'une nouvelle manière aussi du principe dit « caractère graduel », limité pour la plupart jusqu'à présent par la littérature – comme l'on sait – aux coopératives de production agricole. *La classification des coopératives favorise donc l'élaboration du contenu des règles communes relatives à toutes les coopératives, ainsi que des règles exprimant les différences spécifiques des coopératives.*

d) La typisation constitue également une question fondamentale du perfectionnement de la théorie coopérative. Tout système théorique exige par nature le groupement, la systématisation des phénomènes appartenant à sa sphère, l'élaboration de leurs identités et différentiations, puisque sans cela n'existe aucune connaissance scientifique. La typisation des coopératives représente donc une portée appréciable pour toutes les disciplines jouant un rôle dans la formation et le développement de la théorie coopérative. Parmi ces disciplines l'on doit mentionner la science de l'économie politique, la sociologie, les sciences juridiques et, dans une certaine mesure la science de l'histoire. Et en ce qui concerne notre domaine plus restreint, les sciences juridiques, la typisation des coopératives constitue l'un des *problèmes fondamentaux de la construction du système du droit coopératif.* Nous avons déjà dépassé le stade du developpement du droit, quand l'existence du droit coopératif n'était pas encore reconnue par tout le monde, il est temps de diriger l'attention vers les recherches plus approfondies des problèmes fondamentaux. Et peut-être l'on doit encore ajouter que la négation (ouverte ou cachée) de la qualité de branche de droit du droit coopératif ne nous décharge non plus de passer en revue les bases de principe de la systématisation (sous certains rapports du manque de la systématisation) actuelle.

e) Enfin la systématisation des coopératives va de pair avec la formation de la *terminologie* adéquate exprimant le contenu des notions. Ce fait rend plus facile dans une mesure appréciable et peut rendre plus efficace la participation de notre pays dans le soutien international accordé au mouvement coopératif des pays en voie de développement. Dans les cercles professionnels il est assez de notoriété à l'heure actuelle que les importants organes spécialisés de l'ONU et les autres organisations internationales intéressées, comme la FAO, ICA, ILO etc. ont créé leur comité commun, le COPAC[6] dans l'intérêt du développement integré des villages, et, à l'intérieur de cela, dans l'intérêt de l'aide des coopératives. Les organismes membres déploient une activité accentuée – dans l'espoir des rapports futurs – dans l'étude de

[6] Joint Committee for the promotion of Agricultural Cooperatives.

la structure des coopératives agricoles des pays développés de l'Europe, et en connexité avec cela ils déploient des efforts pour la systématisation des coopératives de caractère agricole des pays capitalistes de l'Europe occidentale.[7] Il ne peut pas être indéfférent pour nous non plus, surtout dans les années suivantes (les dix années de 1970 jusqu'à 1980 sont consacrées par l'ONU aussi à l'aide des coopératives des pays en voie de développement) avec quelle efficacité nous pouvons présenter aux facteurs gouvernamentaux et non-gouvernamentaux des pays en voie de développement s'intéressant, les avantages et les résultats de notre système coopératif. La portée de cette activité est colorée par le fait que de temps en temps – quoique de plus en plus rarement – à l'heure actuelle également revient en Occident la manière de voir que les coopératives de production agricole des pays socialistes sont des « kolkhozes dirigés par l'État », dont ressort qu'ils ne connaissent assez ni les kolkhozes, ni nos coopératives de production agricole, voire lors de différentes définitions de notion concernant les coopératives de production formées dans les pays occidentaux ils s'efforcent de se limiter de nos coopératives de production pour ne pas être accusés de « kolkhozification ».[8] Nul doute, nous ne pouvons pas attendre de la part des spécialistes occidentaux qu'ils présentent les avantages des coopératives de production socialistes, c'est notre tâche. Mais à côté des résultats, *l'intelligibilité de la typologie* constitue l'une des conditions du travail comparatif, intelligibilité à la portée de tout le monde, que le spécialiste des pays en voie de développement élevé sur les seins occidentaux comprend également, parce qu' il n'est pas certain que p.e. sous la notion de la « coopérative agricole » l'on entend une formation identique en Hongrie, en France ou bien en Tanzanie. Ce n'est pas un fait du hasard qu'en conséquence de l'épanouissement du mouvement coopératif agricole dans les pays en voie de développement et en connexité avec cela par suite des recherches de voie, dans les dernières années ont avancé de nouveau au premier plan dans la littérature coopérative mondiale les problèmes de la typologie coopérative.[9]

On peut approcher du point de vue théorique de la classification des coopératives, de plusieurs façons en rapport avec le fait, *quelle partie de l'activité coopérative nous choisissons* et élevons au grade déterminant. En glanant dans la littérature des années passées, nous pouvons constater que dans les différentes disciplines, en sai-

[7] Lors de la XVIII[e] Assemblée générale de la FIPA (Fédération Internationale des Producteurs Agricoles) de l'an 1971 le groupe de travail ad hoc a proposé trois formes: *le groupement des producteurs* (il correspond à la coopérative spécialisée hongroise), *le groupement de production* (c'est proprement une coopération de production fonctionnant sur la base familiale) et *la coopérative traditionnelle* (coopératives rurales d'achats et de vente). Malheureusement, le groupe de travail *ad hoc* a étudié huit pays de l'Europe occidentale, mais il n'a pas étudié le mouvement coopératif d'aucun pays socialiste. Cf. avec le rapport du groupe ad hoc. Matériel multiplié. 2/1971.

[8] Cf.: Par exemple: MÉGRET, J.: *Les groupements agricoles d'exploitation en commun*. Rivista di Diritto Agrario, 3/1968.

[9] Cf.: HENZLER, R.: *A szövetkezetek* (Les coopératives). Wiesbaden, 1953. Traduction de l'Institut des Recherches Coopératives. Manuscrit. pp. 43–78. Cf. avec l'étude de PICHETTE, U.: *Analyse économique et typologie coopérative* et avec l'étude-réponse de VIENNEY, CL.: *Représentation économique et classification des coopératives*. Voir: Communautés. Archives Internationales de Sociologie, de la Coopération et du Développement. 29/1971. pp. 89–118.

sissant d'une manière différente, des différents points, et en conséquence, en aboutissant aux résultats non-uniformes ont « tâté » les traits communs et distinctifs des coopératives.[10] Si l'on ne peut nommer ces approches tendance, toutefois, elles nous ont conduit, avec quelques pas, plus près de la solution, et de point en point ont rempli de contenu la solution.

a) La plus connue est peut-être la classification de M. *Ferenc Erdei* sur la base de caractéristiques d'organisation technique ou plus précisement d'économie d'entreprise. Suivant cela les coopératives socialistes hongroises ont deux types. La ligne séparative entre les deux types est marquée par le fait que les coopérateurs créent une entreprise coopérative pour compléter leur propre activité, ou bien créent dans le cadre de l'entreprise une exploitation commune, dans laquelle ils unissent leur force de travail et leurs moyens de production. En conséquence, M. *Erdei* distingue des coopératives de type de *production et de commerce.*[11]

b) L'inverse de cela est l'approche de M. *István Hegedüs,* qui indique comme déterminante la position du membre à l'intérieur de la coopérative. D'après lui la ligne séparative consiste dans le fait, si la position des membres de la coopérative à l'intérieur de la coopérative est-elle caractérisée par l'unification de leur force de travail et leurs moyens de production ou non. Dans le cas affirmatif, la coopérative constitue en même temps une forme d'organisation de la participation dans l'activité de production sociale. Si ces caractéristiques n'existent pas, alors il s'agit d'un type, où – quoique les rapports de la coopérative et de son membre ne sont pas sans importance –, mais du point de vue des conditions de vie, ils n'ont qu'une importance conplémentaire. En conséquence il y a des coopératives de type de production, de type mixte et de type de consommation.[12]

c) La troisième approche de typisation part du domaine de l'activité, respectivement du caractère de la coopérative. Suivant M. *Rezsö Nyers* il y a deux types principaux: coopérative de production et coopérative de consommation, « ainsi que dans la vie économique il y a également deux fonctions: la production et la consommation ».[13] Est similaire à cette approche, la manière de voir de M. *Imre*

[10] Bien entendu, nous n'occupons pas que de la littérature des dernières années qui font abstraction des rapports réels du mouvement coopératif actuel hongrois. Nous laissons de côté la littérature d'avant la Libération et immédiatement d'après la Libération. Toutefois, il faut observer que la typisation était en ce temps-là aussi l'une des questions centrales de la théorie coopérative. M. *Gombos* p. e. établit, basés pour la plupart sur leur activité, les *genres* suivants: *a*) coopératives agricoles de production, *b*) coopératives industrielles de production, *c*) coopératives de consommation, *d*) coopératives d'achat et de réalisation, *e*) coopératives de crédit, *f*) coopératives d'assurance, *g*) coopératives de buts (p. e. coopératives de logement) et enfin *h*) les coopératives générales. Op. cit. pp. 59–76. En même temps, M. K. IHRIG analyse le type d'une part sur la base des *fonctions concrètes* de la coopérative donnée et d'autre part de *sa position dans le marché*. Cf.: *Szövetkezetek a közgazdaságban* (Les coopératives dans l'économie). Édition de l'auteur. 1937. pp. 421–427.

[11] ERDEI, F.: *Mezőgazdaság és szövetkezet* (Agriculture et coopérative). Budapest, Akadémiai Kiadó. 1969. ERDEI, F.: *A szövetkezetek elméleti kérdései* (Les problèmes théoriques des coopératives). Társadalmi Szemle, 2/1968.

[12] HEGEDÜS, I.: *A szövetkezeti tagsági viszony közös vonásai* (Les traits communs de la qualité de membre de la coopérative). Voir: *A szövetkezeti reform jogi kérdései* (Les problèmes juridiques de la réforme coopérative). Rédacteur: SZILBEREKY, J. Budapest, Közgazdasági és Jogi Kiadó, 1971.

[13] NYERS: Op. cit. p. 143.

Molnár, qui constate: «Le type coopératif exprime que les coopératives dans quel domaine de la vie économique déploient leur activité. Il distingue des *coopératives de type de production, d'échange et de prestation*».[14] Suivant cette manière de voir la ligne séparative doit être tracée en conséquence qu'il s'agit d'une coopérative de caractère de production ou de non-production.

d) La quatrième, – dans les rapports de notre pays la plus approfondie – est la conception de M. *Gyenes,* suivant laquelle la base de principe de la division est déterminée par:

– le caractère du rapport existant parmi les membres (ainsi que parmi les membres et l'entreprise commune);

– l'étendue des biens communs coopératifs, leur qualité, la manière de l'utilisation des moyens communs; et enfin

– la manière de la formation du revenu de l'entreprise commune, respectivement de l'utilisation de celui-ci.

Par conséquent M. Gyenes établit trois types principaux: coopératives des consommateurs (de consommation), des producteurs marchands individuels, et de production.[15]

Les manières de voir mentionnées sont dignes de toute attention, parce qu'elles approchent à proprement parler du même objectif des points de vue différents, mais le résultat – comme nous venons de le voir – ne peut pas être considéré complètement identique. Malheureusement, l'analyse de la typisation ne s'est pas déployée suffisamment à l'occasion de la discussion en 1968 sur la théorie coopérative, quoique la discussion sur la théorie coopérative et surtout certains résultats de la direction de l'économie introduite en 1968 aurait permis la synthèse de types aussi. Sont justes et actuels même à nos jours les mots de clôture de la discussion exprimés par M. *Erdei:* «A l'égard des types des coopératives ne s'est pas formée une discussion plus approfondie..., sous ce rapport nous ne pouvons pas fermé la discussion et proprement on ne peut considérer comme adopté d'une manière univoque que dans la sphère des coopératives les coopératives de production occupent une place particulière et essentiellement différente des autres, y comprises tant les coopératives industrielles de production que les coopératives de production agricole. Quant à la question de savoir, si nous considérons tout le reste des coopératives comme ayant un caractère unitaire ou non, et quelle soit leur dénomination, on a besoin de beaucoup d'autres discussions encore».[16]

Après la terminaison des travaux de codification coopérative de l'an 1971 il semble également que la manière de voir du législateur était juste, laquelle réalisa la division à trois niveaux. Il a remué, bien que sans le prononçant directement, de

[14] MOLNÁR, I.: Op. cit.

[15] GYENES: *A szövetkezeti intétmények társadalmi gazdasági természetéről* (Sur la nature socio-économique des institutions coopératives). Közgazdasági Szemle, 11/1962.

[16] ERDEI: *A szövetkezeti vita összegezése* (Le résumé de la discussion coopérative). Társadalmi Szemle, 12/1968.

l'immobilisme « la discussion de types », puisque en établissant trois niveaux, assurait un aspect nouveau pour la suite des recherches des problèmes. Il a placé au plus haut niveau les types coopératifs, à niveau moyen les branches coopératives, et enfin par branche et au sein des branches les formes coopératives.

2. Les types coopératifs en Hongrie

Après ce que nous venons d'exposer ci-dessus, il faut examiner la question qu'en fonction du quel fait peut on nommer une formation coopérative type, branche ou forme autonomes.

A l'égard de la méthode de l'approche l'on peut suivre deux chemins: en classifiant en général (donc en faisant abstraction de la réalité existant dans notre pays) ou en prenant pour base nos conditions réelles. Il faut assurer sans condition la *priorité* pour cette dernière méthode et quoi que l'on ne peut pas considérer le développement comme fermé, il faut prendre en ligne de compte – en prenant appui sur les expériences des autres pays – les possibilités aussi. Très justement a indiqué M. *Gyenes* qu'il faut examiner les coopératives non seulement du point de vue « historique », c'est-a-dire en rapport avec le milieu, mais aussi en tant qu'une chose « en soi ».[17] Ensuite, l'examen ne peut pas conduire à résultat que dans le cas si l'on examine les relations de production sociale de la coopérative, d'une manière complexe (donc non en détachant un côté) et déterminées par le milieu, dans leur *dynamisme.*

Le but primaire – au point de vue du droit – de la définition des types, des branches et des formes est la découverte concrète des traits communs des coopératives et des différenciations qualitatives fondamentales qui se présentent entre eux du point de vue du contenu et du système de la création de droit coopérative. Cela n'est pas sans importance au point de vue du développement du membre de la coopérative et du droit coopératif non plus. A l'heure actuelle il ne suffit plus une approche extensive de la question en disant que, entre coopératives de production fonctionnant comme organismes économiques et coopératives de consommation, de commercialisation, de logement et d'épargne il y a au moins autant de différence comme ressemblance par suite des principes coopératifs.[18] Une telle définition obscure ne peut pas être adoptée dans la science ni être utilisée pour la pratique non plus.

La création de la loi uniforme sur les coopératives est devenu possible parce que toute formation coopérative a des traits communs. En Hongrie toute coopérative est une communauté créée par les citoyens poursuivant une gestion d'entreprise et une activité sociale avec la participation personnelle et pécuniaire des membres, fonctionnant sur la base de la propriété coopérative socialiste et de l'autonomie démocratique, étant dotée de la personnalité morale. Ensuite: *L'objectif économi-*

[17] GYENES: Op. cit.
[18] SÁRKÖZI, T.: op. cit. p. 307.

que de la coopérative est de promouvoir le bien-être matériel des membres, et en même temps de participer d'une façon planifiée et économique à la satisfaction des besoins multiples de la société. *L'objectif sociale* de la coopérative est de développer le mode de vie et la manière de pensée socialiste des membres, ainsi que de servir leurs intérêts. Maintenant cependant laissons de côté la présentation détaillée des traits communs et, concentrons l'attention dans ce cas sur les traits *distinctifs.* Sur ce rapport la différence la plus grande entre les coopératives existe dans *le type de la coopérative.* Pour fonder l'autonomie des types des coopératives, respectivement pour les délimiter les uns des autres, il faut prendre comme base – conformément à la manière de voir complexe et dynamique mentionnée ci-dessus – trois caractéristiques en un rapport étroit les uns avec les autres.

Eu égard à la qualité «*membre-centrique*» de notre politique coopérative et de notre législation coopérative, il faut examiner comme un premier point de vue le rapport de la coopérative et du membre, notamment: *quel rôle la coopérative remplit dans les conditions de vie du membre de coopérative et inversement, dans quelle mesure l'activité de membre de coopérative exerce une influence sur la coopérative.* Il faut analyser comme un deuxième point de vue la *structure microéconomique* de la coopérative, notamment: quelle formation organisationelle-économique crée le rapport que nous venons de mentionner et quelle est la place du membre dans cette formation organisationnelle-économique. Bien entendu, le contenu de la qualité de membre a également un rôle déterminant sous ce rapport. Enfin dans la définition du type des coopératives l'on ne peut négliger non plus l'examen de la sphère *macroéconomique.* A cet égard il faut suivre des recherches concernant la question de savoir dans quelle sphère de la reproduction sociale se placent les coopératives et en conséquence quel est le caractère de l'activité de la coopérative.

Les trois facteurs détérminant l'autonomie du type se trouvent dans l'état de l'interdépendance et de la conditionnalité réciproques les uns avec les autres. Au point de vue de la découverte du trait essentiel de la coopérative tous les trois côtés ont une importance, mais seul ni l'un ni l'autre ne donne une réponse concluante pour la classification. Sans doute, le point de départ est le côté subjectif, parce qu'il se trouve dans un rapport direct avec les intérêts immédiats du membre et dans un sens plus large avec les objectifs de l'association. Le côté micro- et macroéconomique se rapporte au côté subjectif comme le cadre (la possibilité) assuré par les conditions sociales données de la réalisation des objectifs incarnés par lui.

Conformément aux caractéristiques énumérées ci-dessus on peut parler à l'heure actuelle en Hongrie de trois types des coopératives: coopératives de production, coopératives de logement et coopératives de consommation (des consommateurs).

1. Analysons d'abord les particularités du *type de production.* Dans ce type le rapport du membre de la coopérative et de la coopérative est caractérisé par la *coopération de travail personnelle et totale,* ainsi que par la *coopération matérielle totale s'adaptant au objectif de la coopérative* (un autre problème constitue, bien entendu, la

manière dont se rélativise apres la coopérativisation d'une branche déterminée de l'économie dans une société donnée, l'obligation coopérative pécuniaire totale). L'activité déployée dans le cadre du rapport de la qualité de membre constitue pour le membre la forme de la participation au travail de la société, respectivement la forme de son existence.

Cette coopération de double direction se réalise dans une *entreprise* créée en commun, reposée sur le travail des membres et en même temps sur leur communauté de propriétaire, dont l'existence est basée sur l'interdépendance et la conditionnalité réciproques de la coopérative et de ses membres. L'activité de l'entreprise est déterminée par l'existence de membres de la coopérative, et en même temps l'activité du membre est la fonction de l'existence de la coopérative. Si dans ce type l'activité de la coopérative ne se repose pour la plupart sur le travail des membres, cela n'est plus une coopérative, mais une pséudo-coopérative. En tant qu'une projection de cette conditionnalité réciproque, les rapports juridiques partiels du rapport juridique de la qualité de membre (les droits partiels qui consistent dans le droit et de l'obligation de la participation à l'activité pécuniaire, d'organisation et coopérative) se trouvent également dans l'état de la conditionnalité réciproque, et au niveau de la coopérative, l'autonomie et l'organisme de travail sont mutuellement liés et le *côté social* résultant de l'objectif sociopolitique de son activité est également complet, donc il constitue en même temps la forme et le moyen de l'organisation sociale des membres aussi. L'activité de caractère social de la coopérative se concrétise non seulement dans des tâches générales de caractère de classe ou de couche sociale, mais au sens actif et passif résultant précisément de cela, à l'égard aussi de *l'individu.*

Les coopératives de type de production – comme leur nom indique aussi – sont à l'égard de leur contenu des coopératives *de travail de production,* ayant pour tâche économique *la production marchande* à réaliser en commun. Ce fait a des conséquences juridiques importantes au point de vue de leur activité de caractère de branche.

Les coopératives de travail des producteurs peuvent être divisées *verticalement* et en conséquence l'on peut distinguer les catégories suivantes:

– Dans notre pays ce sont les coopératives de travail de production en commun qui jouent le rôle le plus grand. Dans cette catégorie entrent les coopératives de production agricole et les coopératives industrielles de production marchande.

– Constituent un sous-groupement séparé les coopératives reliant le travail individuel et le travail commun coopératif, dont l'exemple le plus classique est *la coopérative agricole spécialisée.*

– Le troisième sous-groupement est la coopérative basée sur le travail commun, mais ne produisant pas une nouvelle valeur, la coopérative de prestation. A ce sous-groupement appartiennent en premier lieu les coopératives exécutant pour la population des prestations n'ayant pas un caractère de production marchande, comme p.e. les coopératives des coiffeurs.

– Dans nos conditions est un sous-groupement séparé la coopérative *unissant d'une manière classique des traits de production individuelle marchande* (la coopérative spécialisée). C'est une forme intéressante et historiquement formée de type de production, laquelle en même temps est de commercialisation et d'achat aussi. C'est le trait fondamental de cette coopérative que les membres sont d'une part les travailleurs de l'activité économique commune et d'autre part les personnificateurs de l'entreprise individuelle, et la coopération dans la coopérative vise l'augmentation du revenu personnel du producteur individuel. En dépendance de tout cela leur organisation est également plus lâche que dans les coopératives de production.

– Enfin sur les limites de la production et de la consommation prennent place les *groupements spécialisés* contenant également des traits individuels de production marchande et des traits de consommateurs.

On ne peut apprécier avec justesse le rôle socioéconomique d'une certaine coopérative qu'en examinant les conditions intérieures de la coopérative en rapport avec le milieu. Il pourrait être aussi difficile de séparer ces deux, parce que le milieu influence en permanence sur la coopérative, ainsi que la coopérative donnée est par sa pure existence – mais autant plus par son activité – un facteur actif de la formation du milieu. L'auteur de cet ouvrage a déjà souligné dans une œuvre antérieure[19] que les constatations de M. Gyenes sont importantes parce qu'elles peuvent contribuer dans une mesure appréciable à la découverte d'un trait intérieur essentiel de nos coopératives de type de production connues dans le mouvement des coopératives de production socialistes et par cela à la mise à jour de leur contenu tout entier, à l'élaboration de la voie de l'évolution. La compréhension nette de ce trait est importante surtout dans la période de transition non seulement parce que nous avons hérité des conditions du capitalisme une partie des formes de la coopérative constitutée en vue de la production.

Le trait de production marchande individuelle, dans les conditions actuelles du socialisme ne crée pas un type autonome (mais une telle forme si); au contraire ce trait se trouve nécessairement dans la période de transition dans chaque coopérative constituée pour la production agricole. Le trait de production marchande individuelle se présente avec un autre poids et dans des autres cadres d'organisation dans les différentes formes. Sans doute, le trait de production marchande individuelle se trouve avec le poids le plus grand dans les coopératives spécialisées et le moins grand dans les coopératives de production agricole, mais il appartient cependant à ces dernières aussi à condition que l'exploitation domestique des membres joue également un rôle de production marchande. L'on peut arrêter donc comme une thèse générale que dans la période de la réorganisation et consolidation socialistes de l'agriculture, dans les coopératives de différent degré l'on peut constater un double aspect social: d'une part elles sont de trait socialiste, et d'autre part de trait de pro-

[19] NAGY: *Szövetkezeti elvek termelőszövetkezeti mozgalmunkban* (Principes coopératifs dans notre mouvement coopératif de production). Budapest, Akadémiai Kiadó, 1965.

duction marchande individuelle. Plus la forme est basse, plus le poids du trait de la production marchande individuelle est grand, et plus la forme est haute, plus le poids du trait de la production marchande individuelle est bas. C'est une thèse générale cependant que dans les conditions du socialisme le côté de production socialiste avance avec certitude au premier plan dans toutes les coopératives.

Il convient encore de compléter nos explications ci-dessus avec deux observations: La forme de production marchande individuelle peut être en effet – dans les conditions du capitalisme ou à titre provisoire dans le commencement du mouvement coopératif d'un certain pays – un type autonome, mais *c'est de règle – démontrée par tant de faits – qu'elle doit se transformer partout, tôt ou tard dans une unité économique plus restreinte de caractère de production en commun.* Notre deuxième observation est que, bien sûr, cette constatation ne se rapporte pas aux groupements spécialisés.

Les coopératives de travail des producteurs peuvent être divisées aussi *horizontalement*. La base de la division horizontale s'adapte toujours à la structure économique du pays donné. En prenant pour base le développement actuel de l'économie populaire hongroise, l'on peut présenter comme résultat de la division horizontale le groupement suivant:

– le groupement premier et le plus grand est constitué proprement par les coopératives de l'économie alimentaire, notamment les coopératives agricoles et des pêcheurs. Dans le cas présent il s'agit bien entendu des coopératives de pêcheurs des lacs et des fleuves hongrois attachés par beaucoup de liens à l'économie populaire;

– les coopératives s'occupant de la production industrielle constituent le deuxième grand groupement. Dans ce groupement entre une partie significative des coopératives industrielles hongroises, lesquelles déploient une activité productrice dans le sens économique du mot, donc créent une *valeur nouvelle;*

– au troisième groupement appartiennent les coopératives déployant une activité de prestation.

Dans le cas de la division *horizontale* il faut observer cependant deux exigences. D'une part que l'activité d'une coopérative ne peut jamais se réduire à une activité de base donnée, parce qu'à l'intérieur de son groupement elle embrasse un large cercle des activités, d'autre part en conséquence du développement industriel certains groupes pénètrent dans les autres et se créent aussi des *formations mixtes*. Mais ces questions constituent toujours dans un pays donné un problème historique du développement de l'économie.

2. Le deuxième type du mouvement coopératif hongrois est *la coopérative de* logement. La littérature la considère tantôt comme l'une des branches des coopératives de consommation, tantôt comme une « autre » coopérative (laquelle n'entre ni dans la sphère de la production ni dans celle de la consommation). D'après notre opinion la coopérative de logement est un type autonome, notamment pour les considérations suivantes:

Les rapports personnels entre la coopérative et son membre sont exprimés par une coopération communautaire-personnelle se dirigeant sur *la création et le fonctionnement durable* d'une masse de biens d'une destination déterminée et par une unification limitée des biens s'adaptant à cette destination. La caractéristique de ce rapport est que l'étendue de l'unification des biens est déterminé par l'activité personnelle s'exprimant dans la coopération communautaire, il est donc limité par l'objectif fixé, et en même temps *l'activité personnelle* se dirige sur la création et le maintien *d'une masse de biens d'un caractère de consommateurs communs.*

– Ce rapport double se réalise dans une entreprise créée en commun. Nous utilisons le terme « activité d'entreprise » exprès, car dans l'activité de logement se trouvent aussi des éléments d'entreprise. Dans ce type, l'entreprise est identique avec l'activité coopérative relativement partielle des membres.

– C'est une particularité de ce type qu'il unie des traits de producteur et de consommateur, en constituant une activité de la *gestion de logement*. Il a une forme d'organisation particulière, son activité sociale n'embrasse pas l'ensemble ou la majorité des conditions de vie du membre, mais se dirige sur l'objectif de la coopérative. Ce grand type de l'association est *l'association de logement.*

La *coopérative de logement* est une notion collective, à l'intérieur de laquelle se séparent plusieurs formes. L'épanouissement de ce type a été favorisé en grande mesure par la discussion sur la politique coopérative à propos de l'introduction du nouveau système de la direction de l'économie nationale de 1968. Le 31. XII. 1973 627 coopératives d'entretient de logement, 261 coopératives de construction de logement, 131 coopératives de garage et 8 coopératives de villégiature fonctionnaient déjà. Mais nous ne pouvons aucunement affirmer que ce type de coopération se soit déjà développé dans sa richesse de forme totale et pour cela, il semble que ne se soient pas encore arrivées à maturité toutes les conditions nécessaires à la classification. «... les voies sont ouvertes devant l'association de logement. Mais elles ne sont pas toujours plates – dit M. Rezső Nyers. Il y a ici encore beaucoup de choses à mettre en ordre, l'image de l'ensemble de la société se caractérise plutôt par les remous que par la cristallisation.»[20] Sans doute, par cela s'explique que la littérature considère les coopératives de logement tantôt comme une branche des coopératives de consommation, tantôt comme une forme de ces dernières. « Dans les coopératives de logement c'est le logement même qui constitue l'object de la consommation, et il doit être considéré dans un certain stade du développement économique – quand les exigences ‹quantitatives› relatives à logement sont déjà satisfaisables – comme l'un des biens de consommation durables.»[21]

A cette manière de voir correspond aussi la structure d'organisation que la branche des coopératives de logement a constitué son organe représentatif dans le cadre de la fédération centrale des coopératives de consommation (abbréviation en

[20] NYERS: Prise de parole lors du VII[e] Congrès des coopératives de consommation.

[21] PÁL: op. cit. p. 18, ensuite: *Mezőgazdasági jog* (Droit agricole). Manuel. Rédacteur: NAGY, L., Budapest, Mezőgazdasági Kiadó, 1971. p. 191.

hongrois: SZÖVOSZ). A l'heure actuelle cette division doit être considérée comme naturelle, et le but de nos constatations suivantes est l'établissement de la structure théorique et non la critique des cadres d'organisation actuels.

Nous sommes de l'opinion qu'il ne suffit pas de partir seulement de l'objet de la consommation pour déterminer l'appartenance d'un grouppement coopératif. En analysant les rapports du contenu intérieur de la coopérative de logement – nous croyons qu'il est arrivé le temps de la *considérer non comme l'une des branches des coopératives de consommation, mais comme l'un des types autonomes de la coopération hongroise.* La coopérative de consommation est au point de vue de la pratique une coopérative de commerce, elle se place donc dans la sphère de l'échange; l'activité de la coopérative de logement ne peut pas être identifiée avec l'activité commerciale du point de vue économique, sociologique ou juridique non plus.

Le but des coopérateurs de logement est en s'appuyant en premier lieu sur leur propre force (à l'intérieur de cela par exemple sur les pré-économies) et sur leur propre activité, avec la concentration commune des énergies de créer un foyer propre (d'assurer pour leurs membres un droit d'usage durable de logement – le cas échéant le droit de propriété), et en rapport avec cela de résoudre dans le cadre de la coopérative les tâches relatives à la gestion, à l'entretien, à la rénovation de l'immeuble, respectivement aux préstations et à la vie en commun.[22] Tandis que la coopérative de consommation est une *forme d'organisation du commerce,* qu'il s'agisse des coopératives urbaines ou rurales, la coopérative de logement est une des formation d'organisation de l'économie de logement – en tant qu'une activité économico-sociale appelée à résoudre l'un des problèmes tendus de la société moderne. Dans le centre de l'objectif de l'activité se trouve donc non la *répartition* des certains biens déjà produits par n'importe qui, mais une préoccupation visant la création, la répartition et l'entretien d'une valeur encore non-existante.

L'adhérence dans le rapport de la qualité de membre n'est pas aussi étroite comme dans les coopératives de type de production, mais non aussi inconsistante que dans le cas des coopératives de consommation. En ce qui concerne l'identification coopérative, cela ne peut pas être identifiée avec les coopératives de consommation. Seulement deux tiers des membres des coopératives de consommation se considèrent effectivement comme membre – résume son opinion dans un examen sociologique M. *Vilmos Tomka*[23] – mais il serait difficile d'imaginer que n'importe quel membre de coopérative de logement ne se considérerait pas comme membre de la coopérative. L'identification est en effet une réflexion subjective du rapport pécuniaire, d'organisation et de coopération, réglementé au point de vue juridique, ayant donc une application juridique, existant effectivement entre la coopérative et son

[22] Cf.: *A lakásszövetkezés szövetkezetpolitikai elvei* (Les principes de la politique coopérative de l'association de logement). Voir: CSIZMADIA–K. NAGY–ZSUFFA: *Szövetkezetpolitikai kérdések* (Problèmes de politique coopérative). Budapest, Kossuth Kiadó, 1973. p. 25.

[23] TOMKA, V.: *Az ÁFÉSZ társadalmi jellemvonásai* (Les caractéristiques sociales de l'ÁFÉSZ). Szövetkezeti Kutatóintézet Közleményei, 59/1968.

membre. Dans la coopérative de logement ce rapport n'est ni homogène, ni hétérogène, mais il se place entre ces deux. Il s'agit d'une vie commune similaire, comme dans le rapport des membres de la coopérative de production, cependant non dans le domaine de la *production*, mais de l'accomplissement d'une part du *temps libre.*

La réflexion pécuniaire de la coopération communautaire ne se sépare pas des membres en tel point comme dans les coopératives de consommation, puisque la base pécuniaire reposant sur l'unité des biens communs et personnels se lie – en dépendance de la forme – plus au moins étroitement à l'existence « infrastructurale » du membre de la coopérative, proprement dit: à son logement. En rapport de cela la position de propriétaire et de locataire s'allie, de sorte que *l'autonomie coopérative et le collectif des locataires* forment une unité étroite.

Sans doute, la coopérative de logement ne peut pas être considérée, dans le sens classique du mot, comme une entreprise, mais on ne peut pas discuter non plus qu'elle a un caractère d'entreprise, en poursuivant une économie de type d'entreprise et son activité étant colorée par des éléments d'entreprise (p.e. elle loue aux personnes non-membres de la coopérative les magasins situés au rez-de-chaussée) elle peut créer éventuellement aussi des entreprises soumises à son objectif et en conséquence elle se présente également dans la position d'entreprise.

3. C'est une caractéristique du troisième type des coopératives de la Hongrie qu'il constitue une coopération quoique d'un caractère corporatif, mais dans sa réalisation le rapport entre la coopérative et son membre est régi par une coopération isolée et une unification *limitée* des biens y soumise. La particularité de cette coopération est qu'elle crée une entreprise – quoique attachée au service des membres –, mais relativement isolée de ceux-ci. Son activité est une activité *commerciale au service des buts de consommation personnelle.* C'est pourquoi le côté social de son activité est plus pâle parmi les coopératives et s'étend plutôt sur la représentation générale des intérêts (p. e. sur la représentation des intérêts des consommateurs). Ce type de la coopérative s'appelle *tantôt commercial, tantôt de circulation, tantôt de consommation.* Récemment est en train de formation l'attitude que pour la dénomination de ce type est plus correct le terme: « coopérative des consommateurs » en tant qu'une branche de la coopérative de consommation. Derrière cette manière de voir effleurant les bornes du maniérisme, ainsi que derrière des terminologies différentes se cache le fait que ce type déploie des activités très variées. Ainsi la tâche la plus importante des « ÁFÉSZ »-s est l'amélioration essientielle de l'approvisionnement de leurs membres et de la population en articles de consommation. Elles doivent accorder l'attention aux exigences particulières de leurs membres et des différentes couches de la population etc. Le rapport de la *coopérative de crédit* et de son membre a également une structure si non complètement identique, mais similaire. Les traits caractéristiques principaux de la coopérative de consommation sont les suivants:

Le rapport du membre et de la coopérative – donc le contenu du rapport de la qualité de membre – n'est pas de caractère essentiel et n'est pas exclusif pour le membre, parce que l'existence du membre est assurée par un revenu provenant d'un

autre rapport juridique et l'activité économique de la coopérative au point de vue du ménage du membre, c'est-à-dire pour la satisfaction de ses besoins personnels est de caractère complémentaire, et en dernière analyse supplémentaire. (De ce point de vue les objectifs nommés de petite production doivent être considérés d'objectif de consommation, parce que « l'activité domestique » est au fond de caractère de consommation personnelle. Si le membre ne trouve pas satisfaisant l'exercice de ses droits provenant du rapport coopératif, il peut exercer également tous ces droits à travers les organismes de nature similaire du secteur étatique. Un trait caractéristique de ce type est en même temps qu'il poursuit une activité de « vente ouverte »; *les réalisateurs de l'activité de la coopérative sont également membres et non-membres.* Il s'ensuit de là la recherche et la réalisation de la question par trôp importante que – en dernière analyse – les membres propriétaires en quoi sont *plus bénéficiaires* par suite de leur qualité de membre, que les non-membres.

Le rapport des biens coopératifs communs et du membre ne constitue pas du point de vue statique et dynamique également une unité étroite comme soit dans la coopérative de type de production, soit dans la coopérative de logement. Le rapport pécuniaire est donc de caractère *accessoire* et en conséquence est limité. Cela se rapporte également à la contribution pécuniaire et à la participation provenant de ce rapport. (Cf. avec le décret N° 9/1972 [9. V.] promulgué en commun par le Ministère de Commerce et le Ministère des Finances.) La coopération personnelle vise la meilleure satisfaction des besoins des consommateurs, la possibilité de la réalisation, l'entraide et l'utilisation des prestations. Dans les coopératives de ce type l'organisme de l'autonomie et l'organisme du travail se séparent. Ce fait mérite l'attention spéciale parce que la séparation de ces deux ne peut pas constituer une base juridique que ces coopératives exécutent l'activité à l'intérieur de l'entreprise par des salariés. Ensuite: un facteur significatif de l'augmentation des biens coopératifs est aussi la population en dehors de la coopérative.

La division à l'intérieur de la coopérative de consommation est déterminée par le caractère de l'activité au service des consommateurs, en conséquence l'on doit faire une distinction à l'intérieur de cela entre les branches déployant une activité de *caractère commerciale* et une activité *d'ouverture de crédit.* La première est réalisée par l'ÁFÉSZ, la deuxième par la coopérative d'épargne.

3. Les problèmes de la branche et de la forme

A l'intérieur des types les coopératives se divisent par *branche.* Il n'est pas exclu naturellement qu'à l'intérieur d'un certain type n'existe acune division de branche, mais le type est en même temps une branche aussi. En général la division par branche s'adapte à la divison économique du pays. En conséquence, l'objectif de la division par branche est la *réalisation des exigences de la politique économique de la branche donnée*, eu égard des particularités des autres secteurs, à savoir des intérêts

de la société toute entière. Ce fait est exprimé par l'art. 111, alinéa (21) de la loi sur les coopératives, selon lequel: « Les ministres dirigeant les secteurs économiques doivent veiller à ce que les coopératives puissent évoluer sur leurs territoires respectifs – comme entreprises – en conformité avec leur importance sociale et leur portée économique. »

Le principe régulateur de la démarcation des différentes branches coopératives sont *l'objectif économique et l'activité de la coopérative.* Par conséquent, la formation de la branche coopérative est la fonction de plusieurs facteurs.

Du moment que l'économie des coopératives doit être classée également suivant que les membres dans quel but et sur quel territoire font appel à la coopération, les points de vue du groupe d'hommes fixant les objectifs de la coopérative sont finalement directifs, et l'on doit réfléter ceux-ci sur la structure de l'activité économique formée dans un pays donné.

Nous venons d'arriver avec cela à l'autre facteur détérminant aussi, notamment à l'inverse du précédent, qu'un certain groupement coopératif atteint le niveau de l'autonomie de branche c'est la fonction du fait aussi que dans la structure économique d'un certain pays quelle activité économique est déclarée branche – bien entendu sur la base des conditions objectives – par la direction de l'État donné.

Comme l'on sait, la résolution N° 2027 de 1967 (28. V.) du Gouvernement a réglementé les branches de l'économie populaire. Ces branches sont les suivantes: l'industrie lourde, l'industrie métallurgique et mécanique, l'industrie légère, les communications, les postes et les télécommunications, les constructions, l'agriculture et l'alimentation, le commerce intérieur, le commerce extérieur et enfin les eaux.

Dans ce que nous avons exposé, nous avons démontré la relativité de l'autonomie de branche. L'autonomie est la fonction de la résolution étatique, parmi les différentes branches il y a en même temps une superposition d'un certain degré aussi. Par conséquent, l'autonomie des différentes branches est relative, et les lignes de démarcation se délavent parmi elles. Le développement de l'agriculture démontre de la manière la plus classique qu'en conséquence du changement de l'organisation structurale de l'agriculture, de la réalisation des exigences dictées par l'intégration verticale, par l'élargissement de la sphère d'activité, les coopératives agricoles poursuivent aussi des activités appartenant à d'autres branches. Nous assistons également à des changements similaires d'une signe contraire dans les coopératives de branche de consommation. D'une manière quelconque l'on pourrait formuler cette exigence objective résidant dans le développement social que les coopératives ont la qualité de déployer une certaine activité appartenant à une autre branche tant que cette autre activité se lie étroitement à l'activité de base et constitue pour ainsi dire une condition de réalisation de cette dernière.

On ne pourrait affirmer que la systématisation de branche est complètement satisfaisante. Il est éclairci d'une manière univoque que dans le cadre de la coopération de type de production, *la coopérative de production agricole constitue une bran-*

che autonome. (A cette manière de voir s'est adaptée aussi la création du droit.) Ce n'est aucunement aussi simple que le système de division en branches dans les coopératives déployant une activité industrielle, parce que l'opinion courante considère à l'heure actuelle encore la coopération industrielle comme une branche de la coopération de type de production, quoique la réalisation conséquente de la manière de voir par branche exige l'accomplissement de la division suivant la branche industrielle. Naturellement, c'est une question entièrement différente que les coopératives de différentes branches industrielles aient un seul organe de représentation des intérêts, quoique mérite l'attention la disposition de la loi sur les coopératives, suivant laquelle les coopératives déployant une activité appartenant à une branche identique de l'économie populaire peuvent créer une fédération s'acquittant de la représentation des intérêts professionnels.

Les coopératives de type de consommation ont deux branches: les coopératives générales de consommation et de réalisation, ainsi que les coopératives d'épargne. Au fond, l'une est une coopérative de commerce de marchandises et l'autre une coopérative de crédit.

La troisième catégorie de la classification des coopératives est la *forme coopérative,* qui marque la réalisation du principe fondamental dit « caractère graduel ». A l'intérieur d'une branche coopérative donnée peuvent fonctionner plusieurs formes coopératives. La forme coopérative peut exprimer:

a) à l'intérieur de l'activité de branche de caractère identique la différence exprimée aussi qualitativement et de façon réglable, de la coopération personnelle;

b) la différence de la coopération pécuniaire, respectivement des attributions de propriétaire reliées a cette première;

c) en conséquence de ces deux, la différence qui s'exprime dans l'activité organisationnelle *générale* et *spéciale* de la coopérative (p. e. dans les unités organisationnelles).

La forme exprime donc à l'intérieur de l'activité de caractère identique les différents degrés de l'activité et de l'organisation et les autres particularités déterminant ces premiers. Leur création remonte d'une part à des causes historiques, et d'autre part à la situation particulière des autres activités économiques.

Dans la branche de la coopérative agricole se sont développées *quatre formes* de la coopérative: la coopérative de production agricole, la coopérative des pêcheurs, la coopérative spécialisée, et le groupement agricole spécialisé. Sous le rapport de contenu économique, les premières deux sont de production marchande, la coopérative spécialisée est dominée par les traits de la production marchande individuelle, tandis que le groupement spécialisé est qualifié par les traits de la production marchande individuelle et par l'unité de caractère des consommateurs. Le groupement spécialisé peut être également – comme nous l'avons déjà mentionné – une forme de la coopérative de consommation.

Dans les coopératives industrielles se sont développées deux formes: *la coopérative de production industrielle* et *la coopérative de l'industrie domestique.*

La division des coopératives de consommation après la forme présente plusieurs difficultés. Dans la coopérative de consommation ne fonctionnent proprement que deux formes: la coopérative générale de consommation et le groupement spécialisé. Suivant son contenu l'on doit classer ici également les coopératives d'épargne, et dans ce dernier cas la branche et la forme coïncident. C'est une formation spécifique de la forme de la coopérative de consommation que *la coopérative de consommation ouvrière* et *la coopérative de consommation scolaire.* Ces dernières deux ne peuvent être considérées comme des formes autonomes, parce que suivant les caractéristiques de la forme elle ne constituent pas des formes séparées; simplement, la possibilité de devenir membre est plus restreinte. Peuvent être membres dans la coopérative de consommation ouvrière les travailleurs de l'usine donnée et dans la coopérative scolaire les élèves et les employés de l'institut d'enseignement donné.

Dans les coopératives de logement se sont profilées jusqu'à présent trois formes: les coopératives des constructeurs de logement, les coopératives d'entretien de logement des propriétaires de logement, ainsi que les coopératives de l'entretien de logement des locataires de logement. A ce type se classent encore les coopératives de villégiature et comme une forme particulière il faut reconnaître les coopératives de garage.

Quoique encorce inconnue en Hongrie, mais peut être imaginée comme une autre forme – p. e. comme en Pologne et en Suède – la forme de la coopérative de location de logement. Par ailleurs nous sommes d'accord avec M. *József Pál* que la coopérative d'industrie du bâtiment de construction de logement n'entre pas dans les formes de la coopérative de logement, parce que celle-ci, pareillement aux autres coopératives de production, peut être rangée parmi les coopératives de travail de production. Nous sommes d'accord aussi du fait que l'immeuble collectif, après une certaine transformation de son contenu, peut constituer une forme autonome du mouvement de la coopérative de logement.

Genossenschaftstyp – Genossenschaftszweig – Genossenschaftsform

von

L. Nagy

Eine Grundfrage der Genossenschaftstheorie und des Genossenschaftsrechts ist die Typisierung der Genossenschaften. Über dieses Thema werden sowohl in Ungarn *(Erdei, Gyenes, Hegedüs, Molnár)* als auch im Ausland *(Fichette, Vienney)* lebhafte Diskussionen geführt. Das Dokumentieren der genossenschaftlichen Typenfreiheit, die Bearbeitung der allgemeinen und besonderen Regeln der Genossenschaften, die Herausbildung einer adäquaten Terminologie usw. stellen je einen bedeutenden Aspekt der Typisierung dar.

Die Klassifizierung der Genossenschaften kann theoretisch verschiedenartig durchgeführt werden je nach dem, welches Gebiet der genossenschaftlichen Tätigkeit für bestimmend hervorgehoben wird. In der Abhandlung werden vor allem die *Beziehungen zwischen Genossenschaft und Mitglied* untersucht und Antwort auf die Frage gesucht, welche Rolle die Genossenschaft in den Lebensverhältnissen ihres Mitglieds spielt und umgekehrt, inwiefern die Tätigkeit des Genossenschaftsmitglieds auf die Genossenschaft auswirkt. Als zweites Problem wird die *mikro-ökonomische* Struktur der *Genossenschaft,* näm-

lich jene wirtschaftlich-organisatorische Formation analysiert, die durch die früher erwähnten Beziehungen entsteht, weiterhin die Frage beantwortet, wo der Platz des Mitglieds in dieser Formation bestimmt ist;abschließend wird auch die makro-ökonomische Sphäre untersucht. In diesem Zusammenhang untersucht die Abhandlung, in welcher Sphäre der gesellschaftlichen Reproduktion die Genossenschaften ihren Platz einnehmen und welch einen Charakter infolgedessen die Tätigkeit der Genossenschaften besitzt.

Aus dem Gesagten folgend kann man in Ungarn von drei *Typen* der Genossenschaften sprechen: von Produktionsgenossenschaften, Wohnungsgenossenschaften und Konsumgenossenschaften.

Innerhalb der Typen gliedern sich die Genossenschaften nach verschiedenen Zweigen. Die landwirtschaftliche Produktionsgenossenschaft ist zugleich eindeutig ein selbständiger Genossenschaftszweig. In der herrschenden Auffassung wird die Industriegenossenschaft als ein einziger Genossenschaftszweig angesehen, die konsequente Durchführung einer Betrachtungsweise jedoch, die für eine Leitung nach Genossenschaftszweigen spricht, würde eine Gliederung nach Industriezweigen beanspruchen. Die Konsumgenossenschaften haben zwei Zweige und zwar der eine ist die allgemeine Konsum- und Verkaufsgenossenschaft (ungarische Abkürzung ÁFÉSZ), der andere die den Charakter einer Kreditgenossenschaft besitzende Spargenossenschaft.

Innerhalb der Zweige gibt es auch eine der *Form* entsprechende Gliederung. Die verschiedenen Formen der landwirtschaftlichen Genossenschaften sind die landwirtschaftliche Produktionsgenossenschaft, die Fischergenossenschaft sowie die landwirtschaftliche Fachgruppe. Innerhalb der Industriegenossenschaften gibt es industrielle Produktionsgenossenschaften und Heimindustriegenossenschaften; unter den Wohnungsgenossenschaften unterscheidet man die Wohnungserhaltungsgenossenschaften, Wohnbaugenossenschaften, Urlaubsheimgenossenschaften und Garagengenossenschaften.

Типы, отрасли и формы кооперативов

Л. НАДЬ

Одним из основных вопросов теории и права кооперативов является типизация кооперативов. Об этом проводятся оживлённые прения как в Венгрии (Erdei, Gyenes, Hegedűs, Molnár) ,так и за рубежом (Fichette, Vienney). Типизация значительна с разных точек зрения: так напр. с точки зрения документации свободы типа кооператива, разработки общих и особых положений о кооперативах и адекватной терминологии, и. т. д.

К классификации кооперативов теоретически можно подходить по-разному, в зависимости от того, какая часть кооперативной деятельности выхватывается и назначается определённой. Первый раз рассматривается *отношение кооператива и его члена*, значит какова роль кооператива в условиях жизни своего члена и наоборот, деятельность члена насколько оказывает влияние на кооператив. Второй точкой зрения анализируется *микроэкономическая структура кооператива*, а именно вопрос о том, какую хозяйственно-организационную формацию создает вышеупомянутое отношение и какое место занимает член в этой хозяйственно-организационной форме. Наконец нельзя не обращать внимания и на изучение макроэкономической сферы. В этом отношении исследуется, что *в какой сфере общественного воспроизводства* находится кооператив и следуя из этого какой характер имеет деятельность кооператива.

Соответственно сказанному в Венгрии можно различать три типа кооперативов: производственные, жилищные и потребительские кооперативы. В рамках типов кооперативы разделяются *по отраслям*. Недвусмысленно, что сельскохозяйственный производственный кооператив попутно является самостоятельной отраслью. Общественное мнение считает отраслью промышленный кооператив, но последовательное осуществление отраслевого управления потребовало бы расчленение по промышленным отраслям. Потребительские кооперативы имеют две отрасли: общий потребительский и сбытовый кооператив, имеющий характер товароторговли, и сберегательный кооператив, имеющий характер кредитной кооперации.

В рамках отрасли разделение продолжается *по форме*. Формы сельскохозяйственных кооперативов; сельскохозяйственный кооператив, рыболовный кооператив и сельскохозяйственная спецгруппа. Формы промышленных кооперативов: промышленный производственный кооператив и промысловый кооператив. Формы жилищных кооперативов: кооператив владельцев квартир, кооператив по содержанию жилых домов, кооператив по строительству домов отдыха, кооператив по строительству гаражей.

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Некоторые вопросы лицензионных договоров

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1. Трактат во введении освещает функции и значение лицензионных договоров в области научно-технической кооперации, распространения и практического внедрения с хозяйственной точки зрения значительных продуктов научно-технической творческой деятельности. Одновременно подчеркивает необходимость создания прочных теоретических оснований расширяющейся практики, что особо обосновывается почти полным отсутствием всеобъемлющего нормативного урегулирования.

II. В дальнейшем исследуются некоторые теоретические вопросы. Освещаются вопросы о пределах сферы правоотношений, охваченной категорией лицензионных договоров, о модели лицензионного договора, о характерных чертах его содержания, о его месте в системе договоров. В ходе изложения этих вопросов освещаются и оцениваются различные теоретические позиции. Выступает за признание лицензионного договора в качестве особого договорного типа и отмечает, что основной моделью договора этого типа является соглашение о предоставлении «ноу-хау». В связи с этим исследуются также возможности и пределы применения по аналогии в этой области традиционных видов договоров.

III. В заключении трактат коротко очерчивает некоторые актуальные практические задачи в области дальнейшего развития применения лицензионных договоров во внутригосударственных и международных отношениях.

I

Вводные замечания

Теоретическая и практическая важность лицензионных договоров имеет всеобщее признание. Параллельно с расширением круга применения лицензионных договоров возрастает и число публикаций, излагающих проблематику, принципиальные и практические вопросы этих договоров. В ходе исследования литературы, однако, бросается в глаза значительная терминологическая неуверенность — можно сказать, путаница —, господствующая в этой области. Изменяющееся содержание распирает, опоражнивает традиционные договорные категории, как последствие изменения охватываемой, урегулированной ими области, поэтому всплывают новые и новые понятия, иногда обоснованно, а порой скорее по моде. Это буйное разрастание терминологии в ряде случаев приводит в смущение даже и практику. Уже почти сложилось такое положение, когда составляет неотъемлимую часть (или же по крайней мере было бы желательно добавление такой части) той или другой статьи, рассматривающей данную тематику, толковый словарь

примененных понятий, из которого явствовало бы, что с каким содержанием употребляет автор отдельные технические термины.

Кажется, что выступающие на поверхности терминологические неясности связаны с более глубокими причинами, которые могут быть сведены к трудностям по вопросам о хозяйственной функции, правовой структуре и содержании этих договоров, об их месте в правовой системе, к нерассмотренным и невыясненным соответствующим образом проблемам.

Статья написана с той целью, чтобы начертать несколько таких проблем и сделать попытку найти их решение. Предварительно, однако, кажется необходимым вкратце изложить хозяйственную роль, значение и состояние правового урегулирования лицензионных договоров.

1. Хозяйственное значение лицензионных договоров

Важность научно-технического развития — хотя и с различным характером и с разной интенсивностью — все более выдвигается на передний план как в макросфере (в народном хозяйстве), так и в микросфере (на уровне предприятий), становится все более определяющим фактором динамического развития экономики, экономного осуществления деятельности предприятия, обеспечения предприятию способности к соревнованию. Техническое развитие в основном можно обеспечить путем применения двух методов (которые, естественно, в типичных случаях применяются совместно и во взаимосвязи), а именно путем использования собственных (материальных и духовных) сил, и путем использования внешних источников, информаций. Учитывая все более возрастающую дифференциацию, специализацию научно-технической деятельности, в наши дни постоянно повышается значение метода, упомянутого на втором месте, и этот метод практически преобладает. В основном мы можем встретиться с двумя вариантами также в области использования внешних информаций. С одной стороны, предприятие может обеспечить технические решения, необходимые для его деятельности, например, таким образом, что на решение проблемы, разработку желаемого технического результата, на создание такого результата выдает заказ внешнему специалисту (например, исследовательскому институту, университету и т. д.[1]). Нередко встречается, однако, что техническая информация, которую предприятие желает использовать, где-нибудь уже была разработана, уже используется, значит в таких случаях открывается возможность — в зависимости от хозяйственных и иных соображений — приобретения этого уже разработанного решения от лица или предприятия, располагающего этим решением.

[1] Целесообразным юридическим средством этого являются т. н. исследовательские договоры. См. об этом Lontai, E.: *A kutatási szerződések* (Исследовательские договоры). (Гражданско-правовые средства, содействующие созданию и внедрению научно-технических результатов) Budapest, Akadémiai Kiadó, 1972.

Необходимость в движении технических информаций возникает не только во внутренних отношениях одной страны, то есть в отношении отдельных внутригосударственных хозяйственных единиц, а значение этого движения все более возрастает и в международном плане. Разделение труда, специализация не останавливается на границе государства, международный обмен научно-техническим опытом все больше расширяется.[2] Соответствующей организации этого обмена опытом придают повышенное значение также стремления к экономической интеграции, а именно Комплексная Программа экономической интеграции СЭВ признает одной из наиболее существенных задач ускорение, повышение эффективности соответствующей научно-технической кооперации.[3]

Принятие решения в вопросе о том, которому из изложенных методов, каналов следует обеспечить первенство на уровне либо народного хозяйства, либо предприятия, или же в какой пропорции следует применить каждый из них, — это в первую очередь входит в область экономической и научной политики и должно основываться на глубоком экономическом анализе.[4] На всякий случай международный опыт свидетельствует о том, что наиболее целесообразным методом является в первую очередь приобретение уже готовых, разработанных в другом месте технических результатов, с особым учетом значительной экономической стоимости фактора времени. Наблюдается скачкообразное повышение оборота лицензий. Так, например, экспорт лицензий Соединенных Штатов Америки в 1964—70 гг, точнее доход от этого экспорта возрос больше чем в два раза, экспорт Англии в 1965—70 гг тоже удвоился, а экспорт Японии в 1963—71 гг возрос в двенадцать раз. Подобные

[2] См. об этом Feige, G.—Seiffert, W.: *Internationale Lizenzen*. Berlin, Staatsverlag der DDR, 1965., в частности изложения на стр. 20 и след.

[3] В первую очередь глава 5-я Комплексной программы. Некоторые очень существенные аспекты этих задач подчеркиваются в работе Müller, M.—Schönfeld, G.: *Die rechtliche Regelung der wissenschaftlich-technischen Zusammenarbeit der Mitgliedländer des RGW unter den Bedingungen der sozialistischen Wirtschaftsintegration*. Berlin, Humboldt-Universität-Lehrmaterial, 1972., в частности на стр. 8 и след., далее в работе Доркин, И. А. —Матвеев, Г. А.: *A KGST-országok gazdasági integrációja és a találmányi jog néhány problémája* (Экономическая интеграция стран-членов СЭВ и некоторые проблемы изобретательского права). Újítók Lapja, 4/1972. Некоторые существенные вопросы этой проблематики были обсуждены в январе 1973 г. на симпозиуме в г. Росток (см. Lontai, E.: *Szocialista gazdasági integráció és a találmányi jog* (Социалистическая экономическая интеграция и изобретательское право), Állam- és Jogtudomány, 2/1973), а также на коллоквиумах, организованных венгерским и советским обществами по охране промышленного права в апреле 1972 г. и в июне 1973 г.

[4] См. об этом Sósmezey, I.: *A licenciavásárlások közgazdasági vonatkozásai* (Экономические аспекты покупки лицензий). Újítók Lapja, 2/1972. Szolgay N.: *Műszaki szellemi termékek átadásának-átvételének egyes konkrét eredményei a hiradástechnikai ipar területén és az ezzel kapcsolatos hazai és külföldi tapasztalatok* (Некоторые конкретные результаты передачи-приемки продуктов технического творческого труда в области техники связи и внутренний, а также зарубежный опыт по этому вопросу). Újítók Lapja, 10/1973. Также на конференции, устроенной в сентябре 1973 г. AIPPI и MIE (Венгерским обществом по охране промышленного права) «*Об актуальных вопросах охраны промышленного права*», был обсужден ряд новых и интересных информаций.

пропорции возрастания показывает и импорт лицензий.[5] Оборот лицензий социалистических стран — как во взаимных отношениях, так и в отношениях с капиталистическими государствами — показывает также значительный рост. Международный оборот лицензий Венгрии — хотя наши показатели в этом отношении могут быть по-видимому обоснованно подвергнуты критике[6] — показывает также эту тенденцию. В 1970—71 гг мы купили в 4—5 раз больше лицензий, чем в 1965—69 гг в среднем.[7]

Мы не располагаем подобными статистическими данными о внутреннем обороте лицензий, то есть об обороте между хозяйственными организациями страны; этот информационный канал является, очевидно, основным и в капиталистических странах. Что касается практики социалистических стран, внутренняя передача таких технических результатов не является исключительной, а в ряде стран даже и не первичной. Мы можем встретиться с целым рядом таких регуляторов потока технических информаций, которые носят административный характер, однако в отношении их действенности, или исключительности возникают основательные сомнения, все больше и больше таких авторов, которые — учитывая хозяйственную стоимость, товарный характер таких технических информаций — подчеркивают роль гражданско-правовых, договорных методов.[8]

Таким образом мы можем установить, что необходимость расширения договорных каналов обмена техническим опытом, применения лицензионных договоров является очевидной как в области международной научно-технической кооперации, так и с точки зрения внутреннего развития социалисти-

[5] См. Wolf, A.: *Lizenztransfer aus weltwirtschaftlicher Sicht*, GRUR, Int. Teil. 8/1973. Лицензионные балансы отдельных государств естественно отличаются друг от друга, недвусмысленно позитивное сальдо показывает лишь практика США, это однако не затрагивает общей тенденции интенсивного повышения оборота лицензий.

[6] Таким образом в статье Szakasits, D. Gy.: *A műszaki fejlesztés hatékonysága* (Эффективность. технического развития.) Közgazdasági Szemle, 1972. Далее в статье Udvardi S.: *A szellemi termékek cseréje és Magyarország* (Обмен продуктами творческого труда и Венгрия). Közgazdasági Szemle, 7—8/1972.

[7] См. материал *Licencia, know-how vásárlások, termelési kooperációk egyes gazdaságossági kérdései* (Некоторые вопросы об экономичности покупок лицензий, «ноу-хау», кооперации в области производства) (Материалы Венгерской Государственной Комиссии по развитию техники, номер 13—7202—T, 1973, координатор Farkasfalvy, E.) Можно установить несомнительную тенденцию роста и на основании материала исследования, произведенного Институтом Государства и Права ВАН на основе выборочного метода. См. об этом *Jelentés a szerződéses rendszer vizsgálatáról* (Доклад об исследовании договорной системы). Budapest, 1970. Рукопись, том II.

[8] См. Рассохин, В. П.: *Vita a Szovjetunióban a műszaki eredmények térítés ellenében történő átadásáról* (Дискуссия в СССР о возмездной передаче технических достижений). Ujítók Lapja, 10/1971. См. далее некоторые точки зрения, выраженные на симпозиуме в г. Росток, упомянутом в примечании 3, а также на варшавской конференции по вопросам изобретательского права, состоявшейся в октябре 1969 г (информирует об этом Lontai, E.: Állam- és Jogtudomány, 1/1970.) и Linden, W.: *Stellung und Perspektive der «Patentlizenz» als Modell einer allgemeinen Rechtsform des internationalen Ideenhandels.* Staat und Recht, 1/1968.

ческих стран; такое развитие соответствует концепциям развития экономических реформ. Поэтому желательно, и даже необходимо, чтобы правовое регулирование эффективно способствовало этому потоку информаций,путем современных правовых норм упорядочивало вопросы лицензионных договоров.

2. *Правовое урегулирование лицензионных договоров*

В самом деле странно, что в таком положении, когда техническая и хозяйственная важность интеллектуального «товарообмена», т. е. оборота лицензий всеобще признается, как выше об этом уже говорилось, тогда же мы можем установить, что нормативное урегулирование лицензионных договоров является чрезвычайно редким. И если такое регулирование имеет место, то и в таком случае урегулированы в первую очередь не вопросы, входящие непосредственно в область договорного права, а административная-финансовая окружающая среда этих договоров, определяется, можно сказать, то «поле игры», на котором могут развертываться договорные отношения. Итак, в ряде стран — социалистических и несоциалистических — урегулированы финансовые (таможенная оплата, валюты, налоги и т. д.) условия заключения международных лицензионных договоров, т. е. заключение таких договоров в ряде случаев допускается лишь при наличии соответствующих разрешений государственных органов.[9] Такое урегулирование обосновано и необходимо; в социалистических странах оно тесно сявзано, например, с соответствующим осуществлением принципа внешнеторговой монополии, является необходимым средством реализации концепций в области экономической политики и научной политики, однако не может заменить урегулирование гражданско-правового характера.[10]

[9] См. об этом Джелепов, С.: *Licenciakereskedelem és licenciaszerződések a Bolgár Népköztársaságban* (Доклад о торговле лицензиями и о лицензионных договорах в Народной Республике Болгарии). (Сообщения Венгерского Общества по охране промышленного права, 6.), а также Bánrévy, G.: *Licenciavásárlások és -eladások engedélyezési eljárása.* (Процедура по даче разрешений к покупке-продаже лицензий). Újítók Lapja, 12/1972. Следует здесь особо упомянуть о барьерах, связанных с сознательной политикой развивающихся стран в области технического развития, так, в новейшее время, об аргентинском законе номер 19. 231 от 1971 г. См. более продобно Aguilar, E. M.: *Technológiai eljárás átadása licenciaszerződésekkel fejlődő országok részére* (Передача технологической процедуры развивающимся странам путем лицензионных договоров). (Сообщения Венгерского Общества по охране промышленного права, 7.). Другой аспект, т. е. ограничения, связанные с исключением конкуренции, с так называемым антитрестным законодательством, излагается в докладе Ladas, S., прочитанном на конференции, устроенной в сентябре 1973 г , о которой упоминается в примечании 4.

[10] Важность такого нормативного урегулирования категорически подчеркивает Linden: op. cit.

Примеры гражданско-правового урегулирования, нормирования вопросов содержания лицензионных договоров мы можем найти лишь в правовых системах нескольких стран, в первую очередь в социалистических странах. Так, в ГДР,[11] в Польской Народной Республике[12] и в нашей стране.[13] Но и эти урегулирования, как правило, в некоторой мере лаконичные, закрепляют лишь некоторые существенные принципы, нормы этих договоров.

В большинстве стран, однако, отсутствует урегулирование даже и на таком уровне. Поэтому практика, в частности практика заключения лицензионных договоров играет выдающуюся роль. Эта практика, в основном, успешно выполняет свои задачи, сформировала и развила обычно применяемые условия этих договоров, причем эти условия — именно вследствие международного характера данной области — показывают в достаточной мере единую картину.

За единой картиной, однако, скрываются и разнородные элементы, различия, и, учитывая пробелы в применяемых национальных законах (здесь, естественно, речь идет о международном обороте лицензий), которые связаны именно с недостаточным урегулированием и с трудностями познания практики применения права, такое положение таит в себе и опасности. Поэтому усиливаются голоса, торопящие международную стандартизацию условий лицензионных договоров[14], и в этом направлении ведутся уже и конкретные работы.[15]

Молчание законодателя, с одной стороны, а обоснованность запросов практики, с другой стороны, ставят в повышенной мере на передний план роль теории. Соответствующее международное урегулирование или унификация, но по крайней мере гармонизация практики отдельных стран, требуют создания необходимых теоретических оснований.

[11] Согласно терминологии, принятой в ГДР, лицензионными договорами называют в первую очередь международные лицензионные соглашения, а договоры, на основе которых организуется передача технического опыта хозяйственных организаций внутри государства, называются Nachnutzungsvertrag. Они урегулированы в Nachnutzungs-Anordnung (NNAO). См. об этом HEIDERSBACH, Ü.: *Licenciaforgalom rendszere az NDK-ban* (Система оборота лицензий в ГДР). Újítók Lapja, 10/1972. KRETSCHMER, W.—OSTERLAND, R.: *Lizenzhandel*. Berlin, Verlag Die Wirtschaft, 1972. См. еще FEIGE—SEIFFERT: op. cit. — вместе с соответствующими нормативными актами.

[12] §§ 29—32 постановления совета министров ПНР от 11 декабря 1972 г об исполнении нового польского изобретательского закона от 1972 г. Смотри доклад KOPFF, A. на конференции в сентябре 1973 г.

[13] §§ 17—20 закона Номер II от 1969 г.

[14] Так KOPFF в докладе, упомянутом в примечании 12.

[15] Разработкой общих условий лицензионных договоров между странами-членами СЭВ занимается специальная рабочая группа Совещания представителей стран-членов СЭВ по правовым вопросам. Смотри в этом кругу еще MÜLLER—SCHÖNFELD: op. cit.

II

3. Особенности правоотношений по использованию продуктов творческой деятельности

Ради разработки теоретических оснований — хотя и вкратце — необходимо вернуться к корням проблемы, к сущности социалистической концепции правового урегулирования вопросов, связанных с продуктами творческой деятельности. В возникновении продуктов творческого труда играют определенную роль как индивидуальный создатель продукта, так и общество, коллектив (меньший или большой коллектив), при этом, нося на себе личный знак создателя, отражая его личность, продукт творческого труда одновременно отличается и общественной полезностью, имеет в области научно-технической творческой деятельности в повышенной мере (хотя в определенной мере и в других областях) экономическую стоимость.[16] В правовом регулировании необходимо отразить, закрепить эту основную связь, значит требование сочетания личных и коллективных интересов, или соответствующую оценку личных и хозяйственных, имущественных моментов. Учитывая взаимосвязанность двух вышеупомянутых систем постулатов, я бы здесь подчеркнул один — значительный с точки зрения нашей темы — момент, а именно имущественный аспект сочетания личных и коллективных интересов. Этот момент ставит на передний план такой метод урегулирования, который может наиболее целесообразно обеспечить соответствующее поощрение как индивидуального создателя, так и окружающей среды, предоставившей соответствующие условия для творческого труда, например коллектива данного предприятия. Опыт показывает, что в этом отношении наиболее эффективным методом является гражданско-правовое урегулирование, или урегулирование, носящее гражданско-правовой характер. Гражданское право, построенное в основном на товарном отношении,[17] отражает особенности товарного отношения; оно обеспечивает наиболее подходящие поощрительные-организаторские средства уже в процессе творческого труда,[18] и тем более в ходе освоения, распространения уже созданных продуктов. Гражданско-правовое урегулирование является первичным и в отношении между индивидуальным создателем и коллективом,[19] и тем более в отношениях

[16] См. Világhy, M.—Eörsi, Gy.: *Magyar polgári jog* (Венгерское гражданское право). Budapest, Tankönyvkiadó, 1962. том. II, стр. 231 и след.

[17] См. в частности Világhy, M.: *Áruviszony és polgári jog* (Товарное отношение и гражданское право). Állam- és Jogtudomány, 3/1968.

[18] О такой роли исследовательских договоров см. работу автора, упомянутую в примечании 1.

[19] Этот принцип последовательно осуществляется нашей новейшей кодификацией в области продуктов творческого труда, регулируя правоотношения создателя и предприятия также в сфере т. н. служебных произведений или служебных изобретений в качестве гражданских правоотношений.

между коллективами, хозяйственными организациями, связанных с оборотом продуктов творческого труда (в частности научно-технического труда). В этих отношениях, учитывая, в частности, особенные черты научно-технической революции, а также концепции экономических реформ, осуществленных в европейских социалистических странах, эти продукты технического творчества выполняют непосредственно определенную роль также в качестве средства соревнования.[20]

Признавая правоотношения, связанные с продуктами творческого труда, в основном гражданско-правовыми, и считая — на основе вышеизложенных аргументов — их урегулирование входящим в рамки гражданского права, мы одновременно должны подчеркнуть и тот факт, что эта правовая область составляет в рамках гражданского права особую область, которая показывает по сравнению с всеобщими, типичными гражданскими правоотношениями целый ряд расхождений. Корни этих особенностей — немножко упрощенно — заключаются в нематериальной природе продуктов творческого труда, в их отличии от физических вещей, составляющих обычный предмет товарного оборота, например, в отличии срока устарения, изнашивания продукта творческой деятельности, срока действия его потребительной стоимости,[21] или в том, что если физическая вещь может быть использована для удовлетворения потребностей практически только одним лицом (или по крайней мере ограниченным числом лиц), то использование другими продуктов творческого труда, в принципе, не имеет таких барьеров.

На вышеуказанном существенном различии основывается в теории социалистического гражданского права общепринятое воззрение, согласно которому т. н. собственническую концепцию продуктов творческого труда следует отклонить.[22] Хотя следует признать правильным утверждение, что гражданско-правовую охрану продуктов творческого труда обеспечивает в первую очередь признание таких правоотношений, которые конструированы в виде абсолютных правоотношений, причем верно и то, что исторически впервые сформировавшимся и с общественной-хозяйственной точки зрения всегда первичным правовым институтом абсолютных по структуре правоотношений является право собственности (в первую очередь, естественно, на средства производства), этот факт, однако, обосновывает лишь тот вывод, что отдельные, ставшие самостоятельными виды абсолютных по структуре правоотношений, абстрагированные из особенностей права собственности, показы-

[20] См. Eörsi, Gy.: *A gazdaságirányítás új rendszerére áttérés jogáról* (О праве перехода на новую систему управления экономикой). Budapest, Közgazdasági és Jogi Könyvkiadó, 1968. В частности стр. 77 и след.

[21] Это, естественно, например в случае авторских произведений, может быть значительно длиннее, однако, в первую очередь в случае продуктов технического творческого труда, вследствие бурного технического развития постоянно сокращается.

[22] См. Világhy—Eörsi: op. cit. том II, стр. 228.

вают структурное родство, и в отдельных случаях (как об этом в дальнейшем еще будет речь) обеспечивают возможность — при необходимой осмотрительности — применения даже и аналогии. Эта ясная позиция теории социалистического права, естественно, — вследствие некоторой исторической инерции и желаемого единства международной практики — не всегда отражена в достаточной мере в юридической терминологии.[23]

Мы можем различать, в основном, две категории правоотношений, связанных с продуктами творческого труда, отчасти на основе их структуры, а отчасти на основе их функций. Т. н. основные правоотношения, обеспечивающие распоряжение продуктами творческого труда, по сути дела абсолютные по структуре, а т. н. правоотношения по использованию, связанные с оборотом продуктов творческого труда, имеют относительную структуру и возникают, как правило, — однако не без исключения[24] — на основе договоров. Основным видом договоров, обеспечивающих использование технических по характеру продуктов творческого труда, является лицензионный договор.

Мы в дальнейшем рассмотрим круг применения лицензионных договоров, наиболее часто встречающиеся особенности этих договоров и их модель.

4. Круг лицензионных договоров

Изучение литературы по этому вопросу убеждает нас в том, что едва ли можем говорить о единой точке зрения о том, какие виды договоров можем признать лицензионным договором. По этому вопросу позиции отдельных авторов размещены между двумя крайними воззрениями на достаточно гетерогенной шкале. Некоторые авторы относят сюда по сути дела все правоотношения, связанные с оборотом продуктов творческого труда, так, например, издательские договоры, принудительную лицензию и т. д.[25] Другие считают применение лицензионного договора обоснованным лишь в том случае, если предусматривается использование такого продукта творческого труда,

[23] Как в литературе, так и в практике употребляется выражение «интеллектуальная собственность», «промышленная собственность» (причем она не всегда промышленная!) и т. д., больше того, в новейших международных соглашениях (например о создании WIPO) применяется также эта терминология. Едва ли является желательным бороться с такими и этому подобными «превзойденными» техническими выражениями (например, охрана промышленного права и т. д.), однако необходимо ясно сформулировать и определить, с каким содержанием, с каким смыслом употребляем данные выражения, так как необдуманное применение того или другого выражения ведет в ряде случаев к выведению порочных заключений. Это относится как раз и к наименованию лицензионного договора.

[24] Так, например, правоотношения, возникающие на основании принудительной лицензии.

[25] Так, в частности, Troller, A.: *Immaterialgüterrecht*. Basel—Stuttgart, Helbing-Lichtenhahn, 1971. том. II, стр. 398 и сл., а также Reimer, E.: *Patentgesetz und Gebrauchsmustergezetz*. Köln, 1968, стр. 461 и след.

который охраняется абсолютным по структуре правом, например патентом.[26]

Мне кажется, что правильное решение следует искать между двумя вышеупомянутыми крайностями. Итак, ни в коем случае не могут признать приемлимым понятие о «безбрежном» лицензионном договоре, которое в силу чрезмерной всеобщности практически перекрывает весь спектр правоотношений, связанных с использованием продуктов творческого труда, и в конце концов не ориентирует, а лишь переносит на другой план проблему классификации по типам. Мы не можем также подвести под это понятие институт принудительной лицензии, который хотя и создает между заинтересованными сторонами гражданское правоотношение, однако отсутствует воля сторон (по крайней мере лица, правомочного распоряжаться продуктом творческого труда, патентообладателя) на заключение договора. Наконец, следует исключить из этого круга договоры по организации потока продуктов творческого труда, направленные на передачу всех (имущественных) прав, связанных с данным продуктом творческого труда; здесь имеем дело с правопреемством, специальные черты лицензионных договоров не осуществляются.

Однако с тремя вопросами нам приходится более основательно заниматься. Это следующие: можем ли говорить о лицензионном договоре лишь в случае предоставления технического решения; основанием лицензионного договора может ли служить лишь абсолютное по структуре право; предоставляются ли лицензиаром на основе лицензионного договора исключительно лишь права негативного характера.

а) *Какую роль играет технический характер*

Здесь по сути дела возникает проблема о том, можем ли мы подвести под круг понятия лицензионного договора лишь соглашения о технических продуктах творческого труда (смотри об этом в пункте б), или входят ли сюда и договоры о пользовании товарным знаком, производственной маркой? По этому вопросу о позиции теории мы можем сделать заключение лишь косвенным образом. Сторонники понятия «безбрежного» лицензионного договора признают, естественно, и эти договоры лицензионными.[27] Однако авторы, подчеркивающие технический характер объекта лицензионного договора,[28]

[26] Seiffert, W.—Feige, G.: *Internationale Lizenzverträge*. Potsdam—Babelsberg, Akademie für Staats- und Rechtswissenschaft der DDR, 1972. том. II стр. 80 и след., Богуславский, М. М.: *Покупка и продажа лицензий в СССР*. Советское государство и право, 1968/5. В венгерской литературе Gazda—Kövesdi—Vida: *Találmányok, szabadalmak* (Изобретения, патенты). Budapest, BMETI 1971. Рукопись, стр. 226.

[27] См. источники, отмеченные в примечании 25.

[28] См. источники, отмеченные в примечании 26.

по-видимому, сторонники более ограниченного понятия. Несомненно — хотя это едва ли может быть решительным теоретическим аргументом, — что мы встречаемся с выражением лицензии товарного знака как в практике, так и в нормативых актах.[29]

Группа явлений, обозначенных категорией охраны промышленного права (промышленной собственности) и сложившихся вследствие исторического развития, включает в себя по сути дела три, относительно обособленные, однако взаимосвязанные области: правоотношения, связанные с продуктами творческого труда технического характера, которые, как правило, излагаются как изобретательское право — патентное право, область «гудуил» в широком смысле, связанную с обозначением предприятия и товара, и, наконец, право, регулирующее вопросы соревнования.[30] Эти три специальные области связываются прежде всего тем, что основная и первоочередная функция правовых институтов, действующих в этом круге — в противоположность другой большой области продуктов творческого труда, авторскому праву —, носит хозяйственный характер, призвана служить хозяйственным интересам правомочных лиц, а именно охране позиции, занимаемой ими в соревновании. Эта хозяйственная выгода может выразиться в более высоком уровне технического развития, однако может выразиться — не вне зависимости от прежнего — и в том, что, например, предприятие, производящее или сбывающее данный продукт, или тот или другой продукт, имеет «доброе имя», пользуется общей известностью, доверием, сбывает товары хорошего качества, таким образом сама ссылка на данное предприятие или на его продукт означает для потребителя «гарантию качества».

Поэтому нам кажется обоснованной точка зрения, согласно которой соглашения о пользовании товарным знаком или другой маркировкой входят в круг лицензионных договоров.[31] Это, естественно, не означает, что внутри этого круга лицензинный договор о товарном знаке не может иметь определенных особенностей.

б) *Проблема так называемых исключительных прав*

Здесь рассматриваемый аспект ставит в первую очередь проблему о том, можем ли мы считать лицензионным договором лишь такие договоры, которые совершаются в связи с использованием технических решений, за-

[29] Так, например, и в §-е 8 закона IX от 1969 г применяется наименование — лицензионный договор о товарном знаке.

[30] См. по этому вопросу в новейшее время Világhy, M.: *Gazdaságpolitika és polgári jog* (Экономическая политика и гражданское право). Budapest, 1969. Докторская диссертация. Рукопись.

[31] И рабочая группа СЭВ, упомянутая в примечании 15, считает лицензионный договор о товарном знаке одним из вариантов лицензионных договоров.

щищаемых исключительными, по структуре абсолютными правами (значит, в первую очередь классические так называемые патентные лицензионные договоры), или же и такие договоры, согласно которым передаются находящиеся в фактическом распоряжении стороны такие технические информации, в отношении которых отсутствует специальная охрана (правовая защита промышленного права), то есть договоры, называемые договорами о «ноу-хау».

Прежде чем сделать попытку решения этой проблемы, необходимо затронуть вкратце два предварительных вопроса. Один вопрос, это характер и роль охраны в виде т. н. «авторского свидетельства». Такая форма охраны, известная — не вполне с тождественным содержанием — в правовых системах ряда социалистических стран, обеспечивает лицу (или организации), создающему технический результат, право на определенное моральное и материальное признание, однако право распоряжаться этим решением принадлежит не создателю решения, а государству. В этом вопросе последний раз высказался Дозорцев.[32] Он отметил, что и охрана по авторскому свидетельству — аналогично патенту — обеспечивает абсолютное по структуре право, однако не для создателя решения, а субъектом этого права является государство. Это — рассматривая вопрос с точки зрения применения договорных методов — означает, что в случае передачи таким образом охраняемых решений за границу, другому государству, или же физическому лицу или юридическому лицу другой страны, этот вид охраны равносилен патенту, значит в этих отношениях совершаются договоры, основанием которых — как и в случае лицензионных договоров, основанных на патентах — служит абсолютное правомочие. Другой вопрос, что внутренний оборот, оборот внутри данного государства таким образом охраняемых технических информаций можно организовать не только посредством применения договорных методов, применение таких методов не является безусловно необходимым, а, с другой стороны, здесь — все чаще — примененные виды договоров основаны не на исключительном праве стороны, передающей техническое решение, поэтому такие договоры большинство авторов, как правило, не причисляет к кругу понятия лицензионного договора.[33]

Следующий предварительный вопрос связан с понятием самого «ноу-хау». В связи с этим в международном плане и внутри страны уже давно ведутся дискуссии, мы едва ли можем говорить о единстве точек зрения. Спорные вопросы возникают, с одной стороны, в связи с тем, является ли «ноу-хау» «побочным продуктом», то есть следует ли признать «ноу-хау» такие навыки, небольшие технические решения, которые не достигают уровня изобретений, однако полезно способствуют практическому внедрению, освоению

[32] В своем докладе на московском коллоквиуме, организованном Венгерским и Советским обществами по охране промышленного права в июне 1973 г.

[33] См. Рассохин, Джелепов: op. cit.

изобретений, или же речь идет о более широком понятии.[34] Другой спорный вопрос связан с тем, является ли тайна необходимым элементом «ноу-хау».

Мы считаем убедительной т. н. абстракцийную теорию «ноу-хау», согласно которой «ноу-хау» является широким понятием, по сути дела оно включает в себя все технические решения, имеющие потребительную стоимость (и на этом основании, как правило, и обменную стоимость).[35] Некоторые виды этого «ноу-хау» в широком смысле (в смысле технических информаций) получают — со специальными условиями и последствиями — самостоятельное урегулирование, специальную форму охраны. Таким образом, граничную черту между патентом и «ноу-хау» определяет не достижение уровня изобретения, а наличие или отсутствие специальной правовой охраны. Отсутствие специальной охраны, например патента, — согласно опыту практики — отнюдь нельзя свести к низкому уровню технического решения (хотя, естественно, иногда может быть последствием этого), а, например, к условиям оформления технического решения патентом (например, исключение некоторых решений, химических продуктов, лекарств и продуктов питания и т. д. из патентования), или — очень часто — к хозяйственным соображениям, торговой политике создателя технического решения или лиц (организаций), которым принадлежит право распоряжаться этим решением. В связи с этим следует учесть также известный «кризис» института патента, инфляцию в области патентов, что может привести к значительному продлению срока, необходимого для оформления патентом, иногда до такой степени, что в течение этого времени хозяйственная стоимость изобретения снижается, а даже и может прекратиться, устареть.[36] Согласно этому следует считать «ноу-хау» независимо от уровня всякую техническую информацию, которая имеет хозяйственную стоимость (является предметом оборота), поскольку не обеспечена ей специальная, институциональная охрана.[37]

Возникает в всязи с этим вопрос о том, является ли вышеупомянутый критерий достаточным для определения понятия «ноу-хау», то есть достаточно

[34] Дальнейшую проблему составляет определение «технического» характера, однако эту проблему мы здесь глубже не рассматриваем. В ряде случаев говорят о «ноу-хау» и в области торговли, организации и т. д., поэтому обычно упоминают, например, о «промышленном» ноу-хау (см. GAZDA, I.: *Az ipari know-how* (Промышленный ноу-хау). Budapest, 1969.), ради отличения от приемов других областей, имеющих хозяйственную стоимость. В настоящем исследовании мы называем «ноу-хау» иформации с техническим содержанием, или тесно связанные технические-организационные информации.

[35] См. по этому вопросу VILÁGHY, M.: *A know-how problémája* (Проблема «ноу-хау»). Újítók Lapja, 3/1968.

[36] Ряд новых кодификаций стремится к развязке вытекающих из этого трудностей, между прочим и новый венгерский изобретательский закон, путем введения системы «отложенного исследования», это, однако, — как подчеркивает LINDEN: op. cit. — часто является только симптоматическим лечением.

[37] См. VILÁGHY: op. cit. или Диссертация. Это такой элемент, в связи с которым впрочем мы можем говорить о сформировании единой точки зрения как в литературе, так и в ходе стремлений к унификации в международном плане, в первую очередь в ходе работ, осуществленных в рамках AIPPI.

ли сказать, что речь идет о техническом решении, имеющем хозяйственную стоимость, или необходимо отметить еще дальнейший элемент понятия, каким является по мнению ряда авторов тайна решения.[38] Эта проблема требует более глубокого анализа и ее подробное рассмотрение выходит за рамки настоящего трактата, однако на всякий случай можем установить, что в ходе многосторонней дискуссии по этому вопросу из чрезмерно пестрых вариантов точек зрения пока еще не сложилась единая позиция. Кажется, что между отдельными позициями нет такого большого противоречия, как это на первый взгляд из дискуссии выявляется. Несомненно способствовало бы выяснению вопроса, если бы удалось более точно, более абстрактно сформулировать понятие тайны, так как в дискуссиях по этому вопросу очень часто употребляют терминологию правовой системы и правовой практики того или другого государства (государственная тайна, служебная тайна, абсолютная и относительная тайна и т. д.),[39] и возможность непосредственного применения этих формулировок при определении понятия «ноу-хау» является очень проблематичной, учитывая, что эти формулировки призваны на решение другой задачи. Кажется, что и точки зрения, которые в качестве элемента понятия признают необходимым «хозяйственную стоимость, оборотоспособность» технической информации, то есть ее товарный характер, причем этот элемент считают одновременно достаточным, исходят из того, что это понятие включает в себя и известные элементы тайны. Ведь — формулируя очень вульгарно — если данное техническое решение общеизвестно, если его можно свободно использовать, то оно, может быть, имеет потребительную стоимость, однако не имеет меновой стоимости. Очевидно, что за передачу какой-либо технической информации уплачивает деньги или предоставляет другую компенсацию лишь тот, кто о данном техническом решении не знает, то есть для кого это решение составляет «относительную» тайну. Этот аспект следует еще сильнее подчеркнуть в отношении нашей темы, то есть в отношении договорной передачи «ноу-хау».[40]

Дискуссии вокруг понятия «ноу-хау» — которые мы изложили выше лишь очень коротко — не препятствуют тому, чтобы мы признали оборот «ноу-хау» очень важным, бурно развивающимся (а, наоборот, служат доказательством этого). Целый ряд фактов — международного и внутригосударственного значения — свидетельствует о том, что число и стоимость договоров о «ноу-хау» возрастает быстрее, чем традиционных лицензионных договоров,

[38] В венгерской литературе особенно Gazda, I. (Gazda — Kövesdi — Vida: op. cit., *Az ipari know-how* (Промышленный «ноу-хау»). Újítók Lapja, 1973/9, а также его работа от 1969 г, вышедшая под таким же заглавием), аналогично предложение Венгерской Группы AIPPI. Материалы будапештского симпозиума, устроенного в сентябре 1973 г, содержат широкое изложение связанных с этим аргументов.

[39] См. материал симпозиума, о котором упоминается в примечании 38, особенно доклады Azéma, J., Kamm, Ch., Sandri, S.

[40] Это отмечается и в статье Világhy: op. cit.

причем даже и превышает их число и стоимость.[41] В типичном случае в договорах, направленных на предоставление технических информаций, их предметом являются как охраняемые технические решения, так и элементы «ноу-хау», причем согласно опыту эти последние являются более значительными.

Разумеется, что это явление — то есть частое совместное выступление в рамках одного договора известных предоставлений в качестве предмета договора — еще не влечет за собой необходимость трактовать их теоретически в единстве, или же не исключает, например в нашем случае, признания двух самостоятельных и равноценных договорных типов, именно — лицензионного договора и договора о «ноу-хау». Смешанные договоры общеизвестны и признаны. Однако в нашем случае речь идет о более глубокой связи, о более тесном единстве.

Основным, определяющим признаком этих договоров является то обстоятельство, что они опосредствуют определенную, ценную техническую информацию. (Дальнейшие аспекты этого вопроса будут рассмотрены в нижеследующем пункте.) Характер методов, институтов, обеспечивающих возможность передачи, право распоряжатся, принадлежащее правомочной стороне в договоре, в этом отношении играет вторичную роль, различия в этом вторичном — хотя и важном — моменте могут обосновать по крайней мере лишь формулирование известных вариантов, например подвидов договора, однако они не затрагивают первичности общих, единых элементов. Если мы усматриваем хозяйственную-правовую функцию лицензионного договора в том, что обеспечивает лицензиату использование определенных технических решений, то следует признать обоснованной точку зрения, согласно которой понятие лицензионного договора охватывает и т. н. договоры «ноу-хау».[42]

Однако, что обеспечивает тому, кто обладает «ноу-хау», его право распоряжаться — в юридическом смысле —, на каком основании может он предоставить эти информации другой стороне, какие средства обеспечивают соответствующие правовые последствия как в отношении стороны, предоставляющей «ноу-хау», так и в отношении стороны, принимающей эти информации, а именно как в их взаимных отношениях, так и в отношении третьих лиц? В случае наличия патента абсолютное по структуре право патентообладателя обес-

[41] См. доклад Lecca J. на симпозиуме в сентябре 1973 года. В отношении нашего опыта см. материал «Доклада» института, упомянутого в примечании 7, а также материал под заглавием *Irányelvek a külföldi műszaki ismeretek megszerzéséhez* (Директивы к приобретению зарубежных технических знаний). (Венгерская Государственная комиссия по техническому развитию, 13-7207-Et, 1973, координатор Szepessy, S.)

[42] Эту точку зрения принимают Linden, Богуславский, Heidersbach в приведенных статьях, а отчасти Seiffert—Feige, а также Kretschmer—Osterland: op. cit. В новейшее время очень категорически Knap, K.—Opltová, M.: *Licenční smlouva* (Лицензионный договор). Acta Univ. Carol. Jur. 1—2., Praha, 1972, а также Knap, K.: *Der Lizenzvertrag als ein besonderer Vertragtypus.* GRUR. Int. Teil, 1973/6—7. Таким же образом Орозова, Б.: *A licencia-szerződéssel kapcsolatos kizárólagos és nem kizárólagos jogok a műszergyártásban* (Исключительные и неисключительные права в приборостроении, связанные с лицензионным договором). Újítók Lapja, 1973/13.

печивает соответствующую охрану и реализаци соответствующих последствий. Однако в случае «ноу-хау» нет такой охраны, мы признали в качестве одного из элементов его понятия именно отсутствие такой охраны. Некоторые авторы в связи с этим подчеркивают, что здесь получатель «ноу-хау» приобретает не право, а «факт».[43]

Проблематика охраны «ноу-хау» еще не разработана, ни de lege lata, ни de lege ferenda. Некоторые авторы считают необходимым введение института формальной охраны, по возможности единой в международном масштабе, однако его контуры (и еще больше возможность его реализации в ближайшее время) еще в значительной мере расплывчатые.[44] Кажется, что в настоящее время — а также в течение обозримого срока — «ноу-хау», или интересы лиц, разработавших опыт, располагающих опытом в отношении «ноу-хау», наиболее эффективно могут охраняться путем нормативных актов об ограничении недобросовестной конкуренции и осмотрительным совершением договоров о предоставлении «ноу-хау», и применением системы санкций гражданско-правовой ответственности, в качестве базисной области обоих упомянутых участков.[45]

Основание этой возможной охраны, или, в качестве ее предпосылки, права на распоряжение в отношении «ноу-хау» мы должны усматривать действительно в фактическом знании этих информаций, можно говорить, что в этом «факте», это однако отнюдь не без правовых последствий. Право может связывать и действительно связывает последствия с самыми, однако, юридически значимыми фактами, причем здесь достаточно ссылаться на поссесорную защиту владения. Таким образом «держатель» «ноу-хау» располагает правовой охраной, принадлежит ему право распоряжения, которое является условием передачи согласно договору, все это, естественно, меньше того, или по крайней мере что-нибудь другое, чем то, что мы видели у патентообладателя. Итак, в случае правовой охраны на него ложится значительное бремя доказывания, он несет значительный риск в отношении возможного нарушения права третьих лиц и т. д.

Мы можем на всякий случай установить, что распоряжение относительно «ноу-хау» — это фактическое положение, имеющее правовую значимость; таким образом, передача «ноу-хау» по договору вполне возможна, причем такая передача кроме фактических технических информаций может предоставить и права, естественно, в рамках принципа „nemo plus juris".

Итак, в круг понятия лицензионного договора входят и такие договоры, которые основываются на юридически значимом фактическом знании, вла-

[43] Таким образом Sebestyén, P. в своем докладе на симпозиуме в сентябре 1973 г.

[44] См. по этому вопросу предложения, выдвинутые в рамках AIPPI, а также материал симпозиума в сентябре 1973 г, особенно доклад Lecca.

[45] Это подчеркнул автор в ходе дискуссии на симпозиуме в сентябре 1973 г.

дении техническими информациями, а не на такой правовой охране, которая по структуре абсолютная.[46]

Подобную проблему к вышеизложенным составляет вопрос об оценке и квалификации соглашений, связанных с передачей технических информаций в таких случаях, когда позиция предоставляющей информацию стороны, или особенности информации выходят за пределы традиционного патентного лицензионного договора. Такую проблему вызывает, например, квалификация договора о передаче т. н. software, которая в значительной мере зависит от того, какой правовой охраной пользуется software. Именно, если выдвигается на передний план охрана по авторскому праву, то такой договор действительно выходит за пределы здесь рассматриваемых вопросов,[47] однако, если мы исходим именно из близкого родства с «ноу-хау», то на основе вышеизложенных соображений мы должны уместить и такие договоры в рамки понятия лицензионных договоров, формулированного более широко, чем традиционное понятие лицензионного договора.

Наконец выдвигается проблема некоторых соглашений, связанных с новаторскими предложениями или служебными изобретениями, с одной стороны в отношениях между рационализатором или изобретателем и предприятием, а с другой стороны — относительно новаторских предложений — по вопросу о квалификации соглашения между использующим предложение предприятием и дальнейшим возможным пользователем. В отношении этого последнего мы можем прийти к тому же выводу, как и в случае квалификации договоров о «ноу-хау», ведь и новаторское предложение содержит также такую информацию, которая эвентуально неизвестна другому предприятию, однако представляет для него определенную стоимость, технический же уровень в отношении понятия «ноу-хау« не играет определяющей роли.[48] Трудно ответить на первый вопрос, то есть на вопрос о соглашении рационализатора или изобретателя со своим предприятием. Едва ли можно оспаривать признание отношений между ними гражданско-правовыми — по крайней мере с точки зрения венгерского права и венгерской правовой теории. Основу их договора, однако, составляет не право распоряжения относитель-

[46] См. работы авторов, указанных в примечании 42. Особенно Linden и Knap подчеркивают категорически значимость фактической — и не правовой — исключительности. Подобную точку зрения занимает в своей статье и Джелепов. Knap отмечает относительность различения вещной и обязательственной охраны, то есть абсолютной и относительной по конструкции охраны. См. по этому вопросу в общем аспекте Eörsi, Gy.: *A szocialista polgári jog alapproblémái* (Основные проблемы социалистического гражданского права). Budapest, Akadémiai Kiadó, 1965, в частности стр. 173 и след.

[47] См. материалы варшавского симпозиума, состоявшегося в октябре 1969 г (сооб. Lontai E., Állam- és Jogtudomány, 1/1970), а также материалы будапештского сипозиума, состоявшегося в сентябре 1973 г. В ходе этого симпозиума Benárd, A. в своем выступлении информировал о положительной точке зрения венгерской судебной практики.

[48] См. Eörsi: *Gazdaságirányítás* . . . (Право перехода . . .). стр. 79 и след., а также стр. 224 и след.

но данного технического решения; в случае служебного изобретения, например, предприятию принадлежит право распоряжения на основе закона, а путем договоров урегулируются в первую очередь условия вознаграждения. Учитывая, однако, то обстоятельство, что такие соглашения в ряде случаев закрепляют право, и/или обязательство, индивидуального создателя на сотрудничество, в практическом осуществлении решения, а также в области его сбыта,[49] далее — учитывая расширяющуюся практику, согласно которой в случае реализации, например, служебного изобретения и изобретатель вовлекается в качестве стороны непосредственно в договор между патентообладателем и покупателем лицензии — мне кажется, что и такие соглашения могут быть включены в категорию лицензионных договоров, однако этот вопрос еще требует дальнейшего исследования.

в) *Позитивные и негативные элементы в лицензионном договоре*

Согласно точке зрения теории, построенной на модели традиционных лицензионных договоров, исключительная обязанность лицензиара, то есть обязанного по договору лица, состоит в предоставлении лицензии, разрешения; сущность лицензии заключается в том, что лицензиар, имея на основе патента исключительное, абсолютное по структуре право на использование определенного технического решения, в отношении покупателя лицензии (лицензиата) берет на себя обязательство не применять против него во время срока действия договора санкций, которые принадлежат ему на основе его абсолютного права против каждого, кто использует решение, оформленное патентом. Итак, это договорное обязательство имеет полностью негативный характер, выражается в воздерживании от пользования определенными правами.[50] Эта концепция, которая построена по сути дела на соображении, что каждый (разумеется, специалист по данному вопросу) сможет относительно легко внедрить решение на основе самого описания патента, уже не имеет авторитетных сторонников, уже отжила свой век.[51] В наши дни среди

[49] Некоторые социалистические правовые системы (ГДР, СССР, новые польские и чехословацкие изобретательские законы) это право и обязательство участия прямо закрепляют.

[50] Таким образом Klöppel, E.: *Der Lizenzvertrag — eine patentrechtliche Untersuchung.* Leipzig, Verl. Veit, 1896. Такой была практика германского суда в конце столетия (Stumpf, H.: *Der Lizenzvertrag.* Frankfurt/M. Maschinenbau-Verlag, 1968. стр.43.) Эта концепция отражается далее в некоторой мере в теории и практике США, Франции и Бельгии, а отчасти также Нидерландов и Швейцарии (см. Kretschmer—Osterland: op. cit. стр. 97.)

[51] Один из выдающихся представителей этого Troller (op. cit., стр. 945). Подобно этому Богуславский, а также подавляющее большинство литературы советского изобретательского права, за исключением в определенной мере точки зрения Яичникова, а также Антимонова-Флейшица (см. более подробно статью *Богуславского*, op. cit., а также Seifert—Feige: op. cit. стр. 50 и след.). Позитивное обязательство подчеркивают следующие авторы: Джелепов, Linden, Knap, Stumpf: Lizenzvertrag. стр. 122 и *Know-how vertrag.* стр. 123, Kretschmer—Osterland. В венгерской литературе Világhy (Tan-

типичных условий лицензионного договора мы можем почти всегда найти закрепление дальнейших обязанностей лицензиара, которые носят «позитивный» характер и выражаются в предоставлении информаций, в обеспечении обучения, в сотрудничестве при внедрении. Такие обязательства еще более естественны в договорах о предоставлении «ноу-хау», в лицензионных договорах о «ноу-хау» (теперь уже можем называть так). Лицензионные договоры, предоставляющие только разрешение на использование, и больше ничего, редки как белая ворона, практически такие договоры совершаются в таких случаях, когда лицензиат сам располагает соответствующими техническими информациями, но их практическое использование нарушало бы (как правило, только использование определенной части информаций) патент лицензиара, значит договор имеет дефензивный характер.[52] В типичном лицензионном договоре чаще всего выступают смешано обязательства «разрешить-воздерживаться» и позитивные обязательства по предоставлению услуг, характерные в отношении «ноу-хау». Больше того, как выше об этом уже была речь, эти последние играют не второстепенную роль, а наоборот.[53]

Однако, и если мы исходим даже из традиционной модели, мы не можем признать убедительным наделение функции негативного обязательства такой исключительной, определяющей ролью. Если мы исследуем другие виды договоров, то можем найти значительное число подобных негативных обязательств (причем нет необходимости в форсированной абстракции). В случае договора купли-продажи обязанность продавца — несомненно позитивная по своему характеру — передать вещь в собственность покупателя, по смыслу включает в себя и обязательство отказаться от своих правомочий, вытекающих из его прежнего права собственности, перестать осуществлять собственность. Обязательство наймодателя обеспечить беспрепятственное пользование имуществом включает в себя как исполнение позитивных действий (поддерживать имущество в состоянии, годном для употребления, ремонт и т. д.), так и негативное по характеру обязательство, а именно, обязательство воздержи-

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könyv (Учебник), том II, стр. 327) отмечает, что «. . . правомочное лицо обязано обеспечить лицензиату такое положение, чтобы он мог в практике использовать предмет патента в пределах лицензии.» Позитивный элемент подчеркивает GAZDA: *Néhány gondolat a know-how szerződésekről, elősorban a know-how átadója szavatossága tükrében* (Несколько идей о договорах «ноу-хау», в первую очередь в свете ответственности стороны, передающей «ноу-хау»). Сообщения Венгерского общества по охране промышленного права, вып. 7.

[52] DÁN, J.: *Találmányok értékesítése. A licenciaszerződés. Jogi problémák a nemzetközi kereskedelemben* (Продажа изобретений. Лицензионный договор. Правовые проблемы в международной торговле). II. Budapest, Közgazdasági és Jogi Könyvkiadó, 1959. Этот автор отмечает, что «чистый» лицензионный договор практически встречается в случаях пиринудительной лицензии (это не договор! Л. Е.), или «Lizenzbereitschaft», однако стороны и здесь в большинстве случаев преобразуют свое правоотношение в типичное соглашение, т. е. в соглашение, содержащее также позитивные элементы.

[53] Явление, состоящее в том, что прежние «дополнительные» исполнения повышаются в главное исполнение, подчеркивает LINDEN: op. cit.

ваться в течение срока действия договора от осуществления прав, обосновывающих его выступление в качестве наймодателя (как правило, речь идет о правомочиях, вытекающих из права собственности или из права управления имуществом). Наличие такого негативного обязательства — которое в отвлеченном виде быть может первичное — в качестве логических предпосылок позитивных обязательств практически можем найти в случае каждого обязательства по предоставлению вещи или по пользованию, значит и в случае таких договоров. Таким образом, мы можем установить, что и в лицензионных договорах предоставление лицензии является обязательством, выступающим как будто в качестве такой предпосылки, а не основным обязательством.

Итак, в лицензионных договорах главную роль выполняют обязательства, направленные на позитивное предоставление чего-нибудь, поэтому из этого обстоятельства необходимо сделать соответствующие выводы в ходе определения характерного содержания лицензионного договора, а также сформулирования типа лицензионного договора и указания его места в системе договоров.

5. Элементы содержания, свойственные лицензионному договору, его модель

Вышеизложенные обеспечивают достаточное основание на то, чтобы попытаться определить характерные элементы содержания и понятия типичного лицензионного договора.

Основание лицензионного договора составляет тот факт, что лицензиар обладает такими — как правило, техническими, или во взаимосвязи с ними другими — знаниями, информациями, которые в меньшем или большем кругу, однако для лицензиара всячески представляют хозяйственную стоимость (возможность выгоды в области соревнования), причем он имеет соответствующее правомочие — может быть это правомочие абсолютное, а может быть не такое — на их передачу и на обеспечение лицензиату их фактического использования.

Лицензионный договор предназначен на передачу данной информации и на ее фактическое применение, использование в кругу деятельности лицензиата — как правило, в соответствии с результатами, достигнутыми лицензиаром, однако непременно в превышающей прежние результаты лицензиата мере.

Исходя из вышеуказанного основания, ради достижения вышеуказанной цели лицензиар обязан предоставлять все то, что предусмотренно договором. В этом отношении возможен целый ряд конкретных вариантов, которые в основном характеризуются тем, что должны быть подходящими для достижения цели договора, то есть должны обеспечить лицензиату такое положение, чтобы он мог фактически и также юридически освоить информа-

цию, составляющую предмет договора, внедрить ее в практике, соответствующим образом распоряжаться ею. В ходе этого он обязан выполнять различные позитивные действия, например, передать документации, рецепты, список материалов, чертежи и т. д., далее — как правило — обеспечить соответствующее обучение, переподготовку. Следует подчеркнуть, что эти позитивные элементы являются первичными, если, однако, лицензиар в отношении технических решений, составляющих предмет договора (или их части), пользуется правовой охраной на основе специального правового института, например патента, в круг его обязанностей входит также предоставление прямого, формального разрешения на использование, это разрешение, однако, — хотя оно безусловно необходимо — по сравнению с вышеупомянутыми позитивными обязательствами, выполняет вторичную роль.

Мы должны здесь рассмотреть еще один вопрос, а именно вопрос о том, каким образом следует оценивать обязанности лицензиара с точки зрения обязательственного права, точнее — носит ли его обязательство характер dare или facere. Некоторые авторы считают, что основное обязательство лица, обязанного по патентному (или вообще по лицензионному) договору, заключается в dare, а в случае договора типа «ноу-хау» в facere, и на этом основании утверждают, что мы здесь имеем дело с двумя самостоятельными типами договоров, которые нельзя смешивать.[54] По моему мнению, как в традиционном лицензионном договоре, так и в договоре о предоставлении «ноу-хау» содержатся обязательства и на dare и на facere.[55] Точнее говоря, обязательство лицензиара — это обязательство, включающее в себя результат. Он обязан обеспечить достижение цели договора, обязан обеспечить лицензиату «объективную» возможность практического внедрения данного технического решения. То обстоятельство, что какими конкретными методами обеспечит он этот конкретный результат, имеет вторичное значение. Таким образом, обязательства по лицензионному договору носят одновременно характер dare и facere, и мы можем скорее установить, что по мере возрастания элементов «ноу-хау» возрастает роль facere, роль конкретных методов (обучение, подробная документация, постоянной контакт, информация и т. д.).

На основании вышеизложенного предлагаю следующую дефиницию лицензионного договора: на основе лицензионного договора лицензиар

[54] Доклад, с которым выступил Sebestyén на будапештском симпозиуме в сентябре 1973 г.

[55] Согласно вышеуказанной точке зрения, договор «ноу-хау» построен на модели подряда, поэтому содержит исполнение, носящее характер facere. В связи с этим следует отметить, что даже и типичный договор подряда не представляет только facere, и подрядчик обязан предоставить определенную работу, предоставить определенный результат, таким образом обязан также на dare, при этом однако — как раз в противоположность купле-продаже, где модель построена скорее на соглашениях, организующих оборот массовых продуктов, определенных по объективным признакам — не безразлично то, что кто предоставляет этот результат (facit), так как личность компетентного подрядчика является более значительной гарантией с точки зрения качества труда, результата.

обязан обеспечить лицензиату такое — фактическое и правовое — положение, чтобы он мог практически внедрить и использовать определенное техническое решение на определенном уровне, или мог применять определенную маркировку, и ради обеспечения этого он обязан предоставлять необходимые информации, или дать необходимые правовые уполномочия, а лицензиат — как правило — обязан уплатить за это соответствующее вознаграждение, или предоставить другую компенсацию.[56]

Напрашивается здесь еще одно замечание. Учитывая именно вторичную роль предоставления лицензии, или учитывая господствующую роль элементов, направленных на обеспечение использования, то есть позитивных элементов, по сути дела было бы правильнее назвать этот вид договоров или эту группу договоров договором по использованию. Несмотря, однако, на это, отчасти в интересах того, чтобы рельефнее подчеркнуть изменение содержания, развитие традиционной категории, а отчасти потому, что тесная связь этих договоров с международной практикой требует применения единой терминологии, мне кажется, что применение названия «лицензионный договор» можно сохранить и в дальнейшем.

Вышеизложенная дефиниция уже отражает ту мою точку зрения, что в отношении лицензионных договоров считаю обоснованным определенное перенесение центра тяжести, другими словами изменение модели. Тот или другой вид договора, тип договора обобщенно, отвлеченно выражает элементы содержания множества конкретных договоров. Модель того или другого типа договора составляет совокупность наиболее часто встречающихся, действительно типичных элементов содержания, соответствующее правовое урегулирование следует построить на этих элементах. Итак, мы видели, что в связи с лицензионными договорами стали характерными позитивные элементы, обязательства по «ноу-хау». Поэтому я полностью согласен с воззрением, согласно которому модель лицензионных договоров составляют договоры, содержащие элементы «ноу-хау» (или содержащие и такие элементы);[57] я выше попытался изложить это обстоятельство и вывести из этого соответствующие заключения и в отношении определения понятия.

Сведя типичные элементы лицензионного договора к модели «ноу-хау», этим, разумеется, не желаю утверждать, что каждый конкретный договор соответствует этим типичным признакам понятия. Выражение «лицензионный договор» я считаю подытоживающим названием такой группы договоров, которая включает в себя разные варианты, договорные подтипы, обладающие определенными специальными признаками — опирающиеся по сути на вышеизложенные существенные элементы. Таким вариантом может быть,

[56] Подобным является определение Világhy (см. примечание 51), а также дефиниция, данная авторами Knap—Opltová.

[57] См. Linden: op. cit.

например, «чистый» лицензионный договор по патенту в традиционном смысле, или лицензионный договор о товарном знаке, или эвентуально безвозмездный лицензионный договор.[58]

Я выше подчеркнул, что типичный лицензионный договор в основном направлен на предоставление результата. Оставаясь при этом мнении, мы должны, однако, отметить и то, что лицензионные договоры, в первую очередь в кругу прибавочных обязательств, могут содержать и обязательства, предметом которых не является результат, а выражают обязательства в отношении применимых средств и методов. Это связано с тем обстоятельством, что лицензионные договоры призваны организовать оборот продуктов интеллектуального творческого труда, а это уже вследствие природы таких продуктов содержит определенные элементы неуверенности, в течение срока действия договора требует тесного сотрудничества между сторонами договора.[59] С этим связано, с одной стороны, что хотя по принципу этот вид договоров создает обязательство по предоставлению результата, риск эвентуального отсутствия результата и вытекающее из этого обязательство лицензиара по возмещению в договорных условиях устанавливаются в ограниченной мере. С другой стороны, с этим же обстоятельством связана относительно значительная роль подготовки договора, предварительного соглашения и соглашения по вопросу опциона.[60]

Наконец, следует еще обратить внимание на один аспект. Количество лицензионных договоров, в частности типичных договоров смешанного характера, содержащих в первую очередь элементы «ноу-хау», постоянно возрастает и возрастает их значение. Тогда же, может быть, еще чаще встречается, что соглашение о лицензии выступает как часть другого, комплексного по характеру договора (например, договора о капиталовложении или о кооперации), или же как элемент договора товарищества в виде вклада сторон.

6. Место лицензионных договоров в системе договоров

Если мы хотим выше дефинированный и исследованный с точки зрения содержания вид договора, то есть лицензионный договор уместить в системе гражданско-правовых договоров, то по сути дела ищем ответ на три вопроса:

[58] Бесплатный лицензионный договор, естественно, не встречается очень часто, однако нельзя считать исключенным. См. Világhy—Eörsi: op. cit., том II, стр. 327. Такой вариант разрабатывается также рабочей группой СЭВ, указанной в примечании 15.

[59] О связи между лицензионными договорами и исследовательскими договорами — отражающими типичное обязательство вида moyens — и об общих особенностях этих двух видов договоров см. Lontai: Kutatási szerződések (Исследовательские договоры), а также доклад, прочитанный на IV. встрече советских и венгерских юристов (сообщение об этом в Állam- és Jogtudomány, 1973).

[60] Например, может играть значительную роль и договор комиссии. Особый вариант этого договора Gazda называет договором реализации (Gazda—Kövesdi—Vida: op. cit. стр. 240 и след).

можем ли подвести его под некоторый из традиционных договорных типов; если нет, то мы признаем наличие самостоятельного договора sui generis, лицензионного договора, и таким образом следует ответить на вопрос, в чем заключаются характерные, отличительные знаки этого договора; в этом случае какую помощь может дать аналогия, основанная на остальных типах договоров?

На первый вопрос ответ является относительно простым. Сегодня уже очень редко встречается такое воззрение, согласно которому лицензионные договоры следует зачислить в категорию договоров, регулирующих оборот физических вещей или пользование ими — являясь последствием в первую очередь инерции, сохранения выше уже анализированной собственнической концепции.[61] Традиционно в виде таких категорий выступают купля-продажа, наем и аренда, иногда возникает вопрос о возможности применения договора товарищества, или — в последнее время в первую очередь в отношении лицензионных договоров «ноу-хау» — договора подряда. Как это в пункте 3 уже было изложено, правовая область продуктов творческого труда внутри гражданского права составляет относительно самостоятельную, особую область, поэтому мы должны отклонить прямое применение институтов, регламентирующих судьбу физических вещей, в первую очередь права собственности, или на праве собственности построенные виды договоров. Поэтому вышеуказанными видами договоров, как возможными категориями лицензионного договора, я подробнее не занимаюсь, а к вопросу о возможности их применения по аналогии ниже еще вернусь.

Можно признать господствующим воззрение, согласно которому лицензионные договоры составляют самостоятельный тип договоров, тип sui generis.[62] Я со своей стороны считаю эту точку зрения правильной, и в вышеизложенном (в пунктах 4 и 5) попытался сформулировать общие особенности этого вида договоров.

Однако признание природы sui generis еще не означает разрешения некоторых — в практике играющих важную роль — частных вопросов типа договоров. Мы раньше уже коснулись явления, которое можно признать всеобщим, выражающегося в отсутствии нормативного регулирования о лицензионных договорах, или по крайней мере в лаконичном урегулировании этого типа договоров. Из этого вытекает, что применитель права в ряде случаев нуждается в опорном пункте для толкования спорных вопросов и для оценки. Так как речь идет о договоре, само собою напрашивается решение, согласно которому следует опираться на нормы обязательственного

[61] В отношении литературных воззрений и судебной практики см. Troller: op. cit., стр. 938 и след., Reimer: op. cit., стр. 461 и след., Knap: op. cit., Dolezil, V.: Licenční smlouva (Лицензионный договор). Studie z mezinárodního práva, 1957, вып. Ш. Stumpf: Lizenzvertrag. стр. 46 и след.

[62] См. Troller, Reimer, Stumpf, Gazda, Dolezil, Seiffert—Feige: op. cit.

права, как базисной правовой области. Мы можем установить с большой правдоподобностью, что в ходе рассмотрения лицензионных договоров, восполнения пробелов урегулирования этих договоров, обоснованно могут быть применены общие нормы обязательственного права, договорного права. Все это подтверждает единство гражданского права, а также в венгерском законодательстве последовательно осуществленная концепция, согласно которой отдельные нормы ГК, хотя они сформулированы в кодексе с учетом круга наиболее частных случаев, однако применимы и в других, более атипичных областях гражданского права. Так, нормы договорного права соответствующим образом применяются к односторонним сделкам, положения обязательственного, договорного права, например, к таким отношениям наследственного права, в которых наблюдается договорная структура и т. д. Значит, исходя из этого, общие нормы о договорах соответствующим образом применимы и к договорам, совершаемым в области продуктов творческого труда. Естественно, что особенности, обусловленные областью и/или объектом договора, должны быть учтены и в ходе осуществления общих норм, требуют более детального урегулирования, а в случае отсутствия такого — более тщательного анализа, и как раз поэтому теоретического исследования. (В дальнейшем я вкратце отмечу несколько таких проблем.)

Таким образом, осуществление общих норм о договорах вполне обосновано. Однако можно ли использовать по аналогии особенную часть обязательственного права, и отдельные выделившиеся виды договоров? Ряд авторов отвечает и на этот вопрос положительно. Некоторые признают таким базисным типом куплю-продажу,[63] другие подряд[64], имеются и такие, кто считает базисным типом наем,[65] и может быть больше всего тех, кто сторонник применения по аналогии договора аренды.[66]

Общим условием применения аналогии является наличие общего элемента между двумя явлениями, однако при отсутствии тождества. Отсутствие тождества – как я это в ряде случаев подчеркнул — обосновывается особой природой продукта творческого труда. А имеются ли между ними общие элементы? Несомненно. Таким общим элементом является прежде всего общность товарного отношения, которая переплетает все гражданско-правовое урегулирование. Таким общим элементом является — в определенном отношении — наличие абсолютного по структуре правомочия, что несомненно обеспечивает структурное родство. Таким образом, в данном случае

[63] Например, Henn, G.: *Problematik und Systematik des internationalen Patent-Lizenzvertrages*. München, Beck'sche Verlag, 1967.

[64] В отношении договора ноу-хау, например, Gazda, Sebestyén.

[65] Munk, L.: *Die patentliche Lizenz*. 1897, Burst, J. J.: *Licenciaszerződések Franciaországban* (Лицензионные договоры во Франции). Сообщения Венгерского общества по охране промышленного права, вып. 6.

[66] См. Stumpf, Reimer, Seiffert—Feige, Gazda: op. cit.

применение аналогии может быть оправдано. В ходе этого следует учесть нижеуказанные точки зрения и применить следующий подход:

а) Следует стремиться к разработке детальных норм, отражающих особенности лицензионных договоров.

б) При отсутствии таких норм применяются общие нормы договорного права.

в) В случае дальнейшего пробела в урегулировании могут применяться и нормы об отдельных традиционных видах договоров, однако

г) аналогия договора купли-продажи может быть применена лишь в случае такого соглашения, которое реализует полное правопреемство, а не в случае лицензионного договора, обеспечивающего частичное и временное пользование;

д) в случае «чистого» патентного лицензионного договора можно прибегать к регулированию, действующему в отношении аренды;

е) а в отношении элементов «ноу-хау» от случая к случаю могут быть применены по аналогии нормы о договоре подряда.

ж) Эти аналогии в случае типичного лицензионного договора могут смешиваться, поэтому

з) возможно противоречие, вытекающее из совместного применения норм об отдельных типах договоров, далее

и) в каждом случае последствия, не совмещающиеся с основными особенностями лицензионного договора, с природой продукта творческого труда, следует, как правило, разрешить с отложением особой нормы, не иначе как на основе общих норм договорного права.

III

7. *Несколько теоретических и практических задач в области лицензионных договоров*

а) *Практические задачи*

В нашей внутригосударственной практике по вопросам лицензионных договоров, учитывая лаконичное урегулирование, желательно ориентировать практику в таком направлении, чтобы она действовала в направлении возможно наиболее подробной разработки договорных условий, в которых были бы учтены все возможные последствия. С той целью, чтобы способствовать этому, было бы целесообразно разработать различные пособия, типовые условия (варианты условий) и соответствующим образом распространить их. Здесь менее желательным является издание примерных договоров, а скорее т. н. checking list, которые прежде всего обращают внимание, а уже менее формулируют отдельные условия.[67] При издании таких пособий следует об-

[67] Автор сделал такую попытку в II томе Доклада Института, отмеченного в примечании 7.

ратить большое внимание на сформулирование единых условий, поэтому можно рекомендовать такое решение, при котором эту задачу взял бы на себя тот или другой функциональный орган (например, Государственное Плановое Управление, Государственная Комиссия Технического Развития, Министерство Внешней Торговли) или хотя бы негосударственный орган (например, Торговая Палата или Общество по охране промышленных прав). Само собой разумеется, что здесь речь идет не о нормах императивного характера, а об ориентирующих-субсидиарных пособиях.

В качестве дальнейшей практической задачи можно упомянуть систематическое собирание и оценку опыта (судов, а еще больше арбитража при торговой палате) в области применения права.

Наконец, — на основе накопленного опыта — перспективно не исключается возможность более детального нормативного урегулирования, чем ныне действующее урегулирование, подчеркивая и здесь его диспозитивный характер.

Мы можем указать практические задачи и в международном плане. В этой области прежде всего сулит успех дальнейшее развитие региональной деятельности, развертывание этой деятельности, как это имеет место в рамках работы органов СЭВ. В ходе этого следует стремиться к разработке вариантов, отражающих интересы и воззрения всех сторон, принимающих участие в сотрудничестве, в частности к разработке таких условий, которые обеспечили бы соответствующее сочетание заинтересованности, поощрения хозяйственных единиц отдельных стран с интересами народного хозяйства и интеграции. Естественно, эти разрабатываемые условия также имели бы ориентировочный характер, были бы только рекомендациями, обеспечив соответствующий простор для самостоятельности, творческой инициативы конкретных партнеров.

Параллельно с региональной кооперацией следует стремиться и к тому, чтобы единые условия, способствующие международному обороту лицензий, сложились также и в более широком кругу.

Наконец, одно практическое предложение. Было бы желательно распространять в более широком кругу правовую практику отдельных стран по вопросам лицензионных договоров, включая сюда и тенденции развития судебной практики, наиболее важные нормы правовой системы данной страны, имеющие значение в отношении лицензионных договоров, чтобы заинтересованные могли компетентно, со знанием дела разрешать вопросы, например, об определении применимого закона, так как в этой области практика показывает черты случайности, не всегда обдумана в достаточной мере. Разработка и опубликование информативного материала по этим вопросам были бы очень полезными, и в этой области общественные организации могли бы играть инициативную роль.

б) *Теоретические задачи*

Развитие практики, подготовка в будущем возможно более детального регулирования требует разработки целого ряда теоретических вопросов. Вот несколько таких проблематик, требующих самостоятельного исследования:

а) Особенности нарушения договора в лицензионных договорах, как в области ответственности за дефекты, так и в области ответственности за правовые недостатки.[68]

б) Особенности последствий недействительности, с особым учетом долгосрочности, практически невосстановимости связей по лицензионным договорам.

в) Последствия изменений, имеющих место в течение действия долгосрочных связей (например, независимо от поведения сторон «ноу-хау» станет общеизвестным), особенности действия оговорки rebus sic stantibus.

г) Потребность интенсивности сотрудничества и ее отражение в договорных условиях.

Quelques questions concernant les contrats de licence

par

E. Lontai

I. Dans l'introduction l'étude met en évidence les fonctions des contrats de licence et leur importance dans le domaine de la diffusion, de la mise en pratique des ouvrages scientifico-techniques qui ont une portée sur le plan économique. Elle souligne en même temps la nécessité d'établir les bases théoriques solides de la pratique qui s'évase; ceci est justifié par le manque quasi total de la réglementation normative synthétique. –

II. Par la suite l'étude examine quelques questions théoriques. Elle traite les limites du domaine des rapports juridiques qui embrassent la catégorie des contrats de licence, le modèle du contrat de licence, ses éléments caractéristiques, sa place dans le système des contrats. Au cours de ces problèmes elle explique et porte des jugements de valeur sur les différentes prises de position théoriques. Elle plaidoie pour la reconnaissance du type de contrat de licence *sui generis* et démontre que le modèle fondamental de ce type de contrat est la convention qui vise la prestation « *know-how* ». Elle examine à ce propos la possibilité et les limites de l'application analogue des types de contrats traditionnels. –

III. Pour finir l'étude ébauche sommairement quelques tâches pratiques d'actualité concernant le développement progressif de la pratique nationale et internationale des contrats de licence.

[68] См. Lontai, E.: *Szavatosság és felelősség a licenciaszerződésekben* (Гарантия и ответственность в лицензионных договорах). Állam- és Jogtudomány, 3/1974

Über einige Fragen der Lizenzverträge

von

E. Lontai

I. In ihrer Einleitung erläutert die Abhandlung die Funktionen und die Bedeutung der Lizenzverträge auf dem Gebiet der wissenschaftlich-technischen Kooperation, bei der Verbreitung wissenschaftlich-technischer Schöpfungen mit wirtschaftlicher Bedeutung und ihrer praktischen Einführung. Gleichzeitig betont sie die Notwendigkeit, der sich stets erweiternden Praxis eine feste theoretische Grundlage zu schaffen. Diese Notwendigkeit ist besonders begründet, da eine umfassende normative Regelung sozusagen völlig fehlt.

II. Darauf folgend untersucht die Abhandlung einige theoretische Fragen. Sie beschäftigt sich mit den von der Kategorie der Lizenzverträge umfaßten Gebietsgrenzen des Rechtsverhältnisses, mit dem Modell des Lizenzvertrages, mit seinen charakteristischen Inhaltselementen und seinem Platz im System der Verträge. Innerhalb dieser Fragen stellt der Verfasser die verschiedenen theoretischen Stellungnahmen dar und bewertet sie. Er nimmt zur Anerkennung eines *sui generis* Lizenzvertragstyps Stellung ein und weist darauf hin, daß das grundsätzliche Modell dieses Vertragstyps die auf die »know-how« abgezielte Vereinbarung sei. In diesem Zusammenhang untersucht er die Möglichkeit und auch die Schranken der analogen Anwendung der traditionellen Vertragstypen.

III. Als Abschluß werden in der Abhandlung kurz auch einige aktuelle Aufgaben zur Weiterentwicklung der ungarischen und internationalen Praxis der Lizenzverträge umrissen.

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Alternatives of the Socialist Notion of Ownership

by

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In the first part of this paper the author subjects the "legalistic" concept of property to criticism and tries to demonstrate the identities and differences between the economic and legal notions of property. After the discussion of the contents of economic property and the forms of property the author proceeds to analyzing in detail the peculiarities of the reflections of property relations in the law. In the second part the author analyzes the potentialities of the notion of commodity ownership under socialist conditions of production and draws the conclusion that traditional commodity ownership as derived from Roman law can be used for the display of state property in the law only under definite conditions. Accordingly we have to recognize the possible multiplicity of ownership in socialism. The discussion continues with the elaboration of theories relating to the new-type socialist notions of ownership, viz. the structuralized ownership of economic law and the state law ownership, as the alternatives of the reflections of socialist property relations in the law.

I. Criticism of the "legalistic" concept of property

As is known western literature on law in general conceives property as a category of law. It should be remembered, however, that the legalistic concept of property was not one to the exclusion of others in western literature. Already Jhering, Duguit, Dernburg distinguished between the material and legal meanings of property. Socialist jurisprudence in general sets out from the differentiation of the material and legal concepts property. However, even in socialist legal literature there are doctrines according to which property is merely a legal concept.[1] Nor can it be argued that in Hungary a large part of legal common opinion considers property exclusively or primarily a legal concept, and this opinion would feel somewhat embarrassed had it to draw a line between material and legal property.

A number of factors account for the unsettledness of the question. Thus the general socialist civil law position, which segregates the material and legal notions of property from each other, contents itself with general truisms inadequate for the indication of the divergent contents of economic and legal property, truisms according to which ownership exists in juxtaposition to property only in class society, owner-

[1] SZABÓ, I.: *A jogelmélet alapjai* (The basic elements of the theory of law). Budapest, Akadémiai Kiadó, 1971. p. 20.

ship brings under regulation property relations in the interest of the ruling class, ownership regulates the essence of property relations, etc. On the other hand for a protracted period of time the dominant trend in socialist political economy, following Stalin, conceived the notion of economic property in a legalistic sense. Stalin, in his definition of the subject-matter of political economy, defined the forms of property as the fundamental element of the production relations, still, as recently demonstrated by philosophers and economists, he actually used property as a legal category and thus regarded the socialist forms of property as given so to say from the outset, as following "from the nature of things", and deduced the relations between owners from the principle of will.[2] This concept of property, defining property on the level of form and at the same time legalistically, has been made subject to rightful criticism in the literature of political economy during the latter years: in this concept socialist property cannot change unless with the modification of the form of property simultaneously with the change of the social-economic configuration, i.e. socialist property in the course of socialist evolution retains its rigidity and immobility. In this legalistic concept of property the property relations detach themselves from the quantitative relations of production, from its technical aspects, economic functioning, and forms of operation.

After the XXth Congress of the Communist Party of the Soviet Union literature of economy and philosophy in many respects ascertained that the theoretical notions of the fundamental elements of the economic structure were simplified. Thereafter, in association with the preparatory work for the introduction of socialist economic reforms, in almost all branches of social sciences intensified tendencies could be observed towards the elaboration of the real contents of socialist property relations. These tendencies, however, did by far not lead to a uniform resultant – "... as many questions of property, the subject-matter or centre of political economy, as many uncertain answers."[3] We cannot therefore be surprised at the opinion predominant in jurisprudence that since the question is economically still unsettled, at a legal elaboration of it, material property substantially cannot be built upon, i.e. either we have to adhere to the original universal fundamental ideas of classical socialist political economy, or jurisprudence, by retracing its steps, will lead from the notion of ownership to a universal material concept of property and then rely on this concept.

The legalistic notion of property receives support from the circumstance that in Marx's works the interpretation of property as the legal (willful) form of the production relations is of frequent occurrence.[4] On the other hand the spirit of the life-work of Marx, and many passages of his works indicate that Marx in point of fact was acquainted with the notion of material property of contents other than those of legal

[2] See SZTÁLIN: *A szocializmus közgazdasági problémái* a Szovjetunióban (The economic problems of socialism in the Soviet Union). Hungarian edition. Budapest, Szikra, 1953. p. 72.

[3] See in Hungarian economic literature e.g. SZABÓ, K.: *A szocialista termelés alapvonásai* (The fundamental traits of socialist production). Budapest, Kossuth Kiadó, 1964. pp. 61 et seq.

[4] See MARX, K.: *Zur Kritik der politischen Ökonomie.* Berlin, Dietz, 1972. pp. 14–15.

property. So e.g. in Vol. III of The Capital he expressly distinguishes the legal and "practical" form of landed property. The pure legal form of the ownership of land – as he writes – will not produce a land rent for the owner. Still it gives him power to prevent the use of land until the economic conditions permit an exploitation of the land yielding a surplus to the proprietor. This monopoly of landed property enables the legal proprietor of land to make the exploitation of the land by the industrial capitalist dependent on the payment of a land rent, however, once the land has been leased, it will have not only a legal, but also a "practical", "real" proprietor, namely the capitalist leaseholder: once this surrender (i.e. the lease) has taken place, the proprietorship of the land cannot on the given plot of ground set up absolute barriers to the extent of capital investments anymore. As soon as the ground has been leased for building a house on it, it will depend exclusively on the lessee whether he will build a high or a low house on it. The leaseholder will become the true exploiter of the surplus work of the agricultural worker. The rent is but a surplus, a surplus above the part expropriated by the expropriating capitalist in the form of a profit, it is not the land rent which is the normal form of the surplus value, but the profit. In other words at the exploitation of the land by way of leasing it there is a single legal proprietor, yet economically two are exploiting it, hence there are two material proprietors.[5] Perhaps we may advance the opinion that it is by no means an arbitrary interpretation to say that when Marx speaks of property as the legal reflection of the production relations, he wants to emphasize the objective character of the production relations as against the volitional, superstructural relations, or the legal regulation of the production relations: property as a generally known legal concept in fact lends itself extremely readily for conveying the idea of this difference. At places the recourse to property as the legal form of production relations, reflects a typically Marxist method, viz. by way of simplification to make the essence to be stressed on to sally out, yet this does by no means indicate as if Marx had ever denied the existence of the notion of material property as distinct from legal property.

Hence in the last resort the legalistic concept of material property merely wants to express that economically only the category of the production relations has a *raison d'être,* whereas property is a purely legal concept.[6] This position is, however, in our opinion, partly for ideological, partly for practical reasons, incorrect.

(a) If Marxism on hand of the closing lines of the Communist Manifesto declares that property is the fundamental production relation, then property cannot be a purely legal notion. The legalistic notion of property turns the often voiced thesis "the economic foundations determine the legal superstructure" upside down: i.e. as

[5] See MARX: *Das Kapital.* Bd. III. Berlin, Dietz, 1949. pp. 806, 799, 814, 850.

[6] E.g. LANGE identified the property of the means of production with the social relations on which all other production relations rely. This fundamental relation comes into being on the ground of the possession of the means of production. Here there is no question of a fortuitous possession, but of a possession recognized by the members of society, preserved by the socially recognized rules of human co-existence i.e. by custom and by the law. *Politikai gazdaságtan* (Political economy). Hungarian edition. Budapest, Közgazdasági és Jogi Könyvkiadó, 1965. Vol. I. p. 32.

if "the subjective created the objective". The western theory of law in a keen-sighted manner senses this contradiction. Stammler, Kelsen, and so in Hungarian literature Gyula Moór, rely on this. E.g. according to Moór, since in Marxism property is the fundamental production relation, and at the same time also the expression of property relations, in reality, as indicated by Stammler, Marx asserts the priority of the law: "in fact the law determines those disposing of the means of production." "Marx's concept as if the law were but a mere reflection of economy ... is in fact not so much the contrary of Stammler's concept, as many are wont to believe, but in reality, these are two variants of the same idea denying the independence and independent character of law and economy."[7] In our opinion the legalistic concept of property represent an idealistic infiltration into the interpretation of the Marxist dialectic relations of base and superstructure, and in the event of a consistent philosophic construction material property would both subjectively, and as for its contents, "depart" from the legal concept of property.

(b) If there were only a legal concept of property, so since the law can without the complete resolution of the concept of ownership emphasize central, primary and fundamental relations only in the institution of ownership, a substantial part of the actual relations of appropriation and disposition, the dynamics of the production relations, their quantitative and technical aspects, their form of economy, would remain outside property, a contingency in which the discipline of political economy would hardly "acquiesce". If we wanted to prevent the legal notion of ownership from breaking away from the production relations or the development of the theory of economy, we should have to accept the subjective and substantive existence of economic and legal property in a manner differing from each other in both the subjective and social sense, on the understanding that both concepts of property have specific, interlocking[8] yet relatively autonomous characteristics. Although it cannot be argued that this breaking away of jurisprudence from the traditional terminology of property has met with opposition in legal public opinion, jurisprudence has to recognize the independent economic concept of property with the proviso, of course, that this novel dynamic material property must not be transplanted into the law automatically: we have to preserve the immanent autonomous peculiarities of the legal concept of property.[9]

[7] See MOÓR, GY.: *A gazdasági élet és a jogi rend* (Economic life and legal order). Budapest, Athenaeum, 1935. p. 8; id. *Tegnap és holnap között* (Between yesterday and to-morrow). Budapest, 1947. p. 146; see further STAMMLER: *Wirtschaft und Recht.* Leipzig, 1906. pp. 192–200; KELSEN: *The communist theory of law.* London, 1955; mainly pp. 14–16; PFAFF, D.: *Die Entwicklung der sowjetischen Rechtslehre.* Köln, 1968. pp. 37, 50, 111.

[8] SZABÓ, I.: op.cit. pp. 17–24; KOZMA, P.: *A tulajdon – a társadalmi-gazdasági alakulat általános kategóriája* (Property – the general category of the economic formation of society). (Dissertation) Budapest, 1969. pp. 128–140.

[9] In particular Czechoslovak literature of economic law bring forward arguments for the effective approximation of the economic and legal concept of property on a basis of economy. See: SPIŠIAK, J.: *Niektoré aspektu na členitu jednotu státneho socialističkeho vlastnictvá* (A few considerations on the proportioned unity of the state and socialist property). Pravnické Studie, 1/1968; HANES, D.: *Ekonomička sustava riedenia narodneho hospodarstva a pravne postavenie statneho podniku* (The system of economic management and the legal status of the state enterprise). Pravnické Studie, 2/1968.

II. Economic concept of property; the forms of property

1. Apart from the legalistic notion of property described before economic (material) property has the following essential interpretations in the literature of political economy: (a) property is the totality of production relations; (b) it is the static precondition of production; (c) it is the appropriative aspect of the production relations. With several authors these possible interpretations of material property are overlapping: the very same author uses the category of property in a number of senses. In legal literature the interpretations under (b) and (c) are perhaps the most popular.

According to Bratus e.g. property as economic category is the precondition of the appropriation of the objects of nature, i.e. of their production realized in a definite social form. Property – he writes – is the situation come about as the result of the appropriation of material goods; the form of property gives expression to the static moment charateristic of the respective method of production: the initial and final stages of social production, of which the final stage will of nature again become an initial stage.[10]

Against this position, on the other hand, the argument may be brought forward that Marx called the concept of property as the precondition of production expressly a tautology. In his work the Forms of Property before Capitalist Production Marx in an extremely graphic form presents the dynamics of economic property. First, in its pristine state property was in fact overwhelmingly a static precondition of production, primitive man being related to the natural conditions of production as such as belonging to him, being his own, which together with his existence are preconditioned. The first form of property is the "movable", because man first appropriated the finished products of the earth, e.g. he gathered fruits (in point of fact this gathering also presupposes a certain degree of working activity), still these are very quickly passing states and can be considered normal conditions nowhere, not even normal primitive conditions. Productive activity is making headway more and more, and so also property in so far as this becomes a reality only as the conscious relationship to the conditions of production as to his own.[11] Hence in the material sense property is not the static precondition of the production relations, but itself a process, dynamics. If property is a precondition of production, or its result, property will become one of the spheres, preceding and subsequent, of production. Of necessity this concept, too, is in the last resort a legalistic one, for only the law can tell us in whose ownership the preconditions of production are. If economic property were a static precondition, so we should be confronted by a notion incapable of development and inadequate for the expression of quantitative relations.

[10] See БРАТУСЬ: *Предмет и система советского гражданского права* (BRATUS: Subject-matter and system of Soviet civil law). Москва, 1963, глава II.

[11] See MARX: *A tőkés termelés előtti tulajdonformák* (Forms of property before capitalist production). Hungarian edition. Budapest, Szikra, 1953. pp. 26–30.

Venediktov, who by the way rejected the concept of property as a precondition and also result of production, defined property (in the narrower sense) as a relation to the means of production as to such of our own: which determines the system of distribution of the means of production and the products of production. This doctrine describing property in a camouflaged manner only as relation of distribution has been expanded by R. Schüsseler. According to his doctrine property is a peculiar relation of distribution and indicates the subjects and objects of appropriation. Property manifests itself as the state of distribution, as a definite social status. However, behind it there is the appropriation of nature by a dynamic process of production. The superficial, narrower sense of property is the attitude to the conditions and results of production, as the organizational form of a special distributive character of the process of distribution, its wider meaning, its inner core is "appropriation through the totality of the production relations.[12] In our opinion, however, property as a specific relation is also fraught with contradictions: if it were a specific relation distribution would determine production.

In our opinion the notion of property will become imbued with life and capable of development, if it is identified with the economic conditions and relations of production to the highest degree. Still when the term property relations is used, the same phenomenon will be examined from another aspect, notably from the aspect of appropriation. When the question is one of the relations of economy and production, then relying on the process of economic activity we follow the path of the products through the various spheres of economy and study the technical and social relations of man as defined by the economic process. When the question is one property then we analyze the same technical and social relations in the first place from the aspect of appropriation. Hence property relations extend to the spheres of production, marketing and distribution, dispose of the technical und economic, social and economy relations, further of the superficial forms of economy in the same way as the relations of economy and production. I. e. the term of relations of economy and production is uniform with that of property relations, only when the term of relations of economy and production (or simplified, of production only) is used, stress is laid on production relations rather, and if the term property relation is resorted to expression is given mainly to the appropriative side. The identity of the relations of economy and production and those of property and their divergence as for aspects reflect the unity of production and appropriation, and their relative difference. The identification of property as appropriation with the relations of economy and production, and so its differentiated (technical and social) concept enables the unfolding of the contents of the genuine Marxist notion of property of infinitely many shades and subject to permanent historical changes. By the side of the abstract notion of economic prop-

[12] ВЕНЕДИКТОВ: *Государственная социалистическая собственность* (VENEDIKTOV: State socialist property). Москва, 1948, стр. 32—34; SCHÜSSELER: *Volkseigentum und Volkseigentumsrecht im Prozeß der Entfaltung des ökonomischen Systems des Sozialismus.* Staat und Recht, 2/1968. pp. 212—217.

erty of this content also socialist property will be capable of expressing to what extent the productive forces of the socialist sector, its technical and co-operative relations, its forms of economy and operation, in the course of socialist construction.[13]

2. If our intention is to analyze the contents of economic property, so on the ground of the so-called anthropological tendency of Marxist philosophy relying on the legacy of Gramsci, and of the praxeological tendency of political economy following in the wake of Oscar Lange, we shall have to analyze the proprietary attitude consisting of the unity of the objective and subjective elements instead of the abstract relation. Relying upon the analysis of the proprietary attitude, in a simplified form, we may venture the statement that economic property as appropriation, stands for exploitation and disposition.

Economic property as objective process of appropriation is the unity of power and external-internal exploitative functions. The first element of exploitation is the hold on the thing. This hold, however, has not to be a direct one, on the analogy of the legal notion of possession. A simplification wide-spread in literature on political economy is the identification of property and possession. For this the incorrect interpretation of the notion of possession may account. In natural economy and in the simple method of commodity production the exploiter held the thing in reality, relatively, in his direct possession. In a commodity producing society built on modern technology this would be an anachronism. In both capitalism and socialism the technical-economic and social-economic relations of property in a large number of cases preclude the direct hold on the thing: the proprietor in fact has no need for a direct hold. The proprietor cannot exploit the thing unless he has a hold on it, this hold on the thing may, however, be effected by any indirect e.g. legal means, or even by way of control of it.

The second element of exploitation (i.e. exploitation proper in the narrower sense of the term) indicates two alternative directions. The first, what may be called internal direction, is fairly simplified and is the use of production and the results of production for the own consumption, i.e. the creation, use and consumption of the value in use or use-value, or the "enjoyment" of the goods. The external direction (in like way simplified) is the exchange of the results of production for other products suitable for the satisfaction of needs in economic relations, i.e. the creation of value, exchange of goods or barter. Naturally with developed forces of production, in a society on a high technical standard, these two basic directions of exploitation will manifest themselves in extremely complex forms, in innumerous partial events of economy, mutually interpenetrating one another: the purchase of products by each enterprise, production, consumption and product marketing activity of an enterprise, will include innumerous forms of external and internal exploitation. For each thing the two directions of exploitation may appear alternatively, or autonomously.

[13] In Hungarian economic literature this doctrine is represented mainly by the works of KÁLMÁN SZABÓ.

In the operation of a given economic organ, however, the two directions must be present of necessity: they appear intertwined and, on the assumption of a commodity producing economy, in a typical case both will be equally important. From the legal point of view the external direction comes into consideration, as a field to be brought under regulation, in general more emphasically. Notwithstanding it must be borne in mind that from the point of view of society as a whole, and following from the primacy of production, the internal side is the fundamental: no goods other than those which have been produced can be exchanged for others. The economically fundamental character of the internal side is best illustrated by the fact that the internal direction of exploitation describes material property in every society, whereas the external direction will receive significance in the commodity producing economy only. The exploitation of highly developed means of production within large manufacturing plants does not merely signify "the management of things" but, in inseparable harmony, the guidance of processes of co-operative work and of organizations as a whole. Furthermore in a commodity economy appropriation will manifest itself not only in the use or the physical consumption of the thing, but on the level of the economic form as the appropriation of value, i.e. as the appropriation of profit or income derived from the nature of things, this fundamental method of the economic realization of property.

When now the subjective side of proprietary conduct is considered the statement may be made that for the economically acting party property at the same time stands for the possibility of choosing the method of utilization, i.e. for the right of disposal of the thing. Projected on to the volitional side of property here the essence consists in disposal. Hence economically disposal is not one of the partial right of property, but property itself from the aspect of the subject.

Property as appropriation, in the merger of the objective and subjective sides of proprietary conduct, will therefore stand for utilization and disposal. By what will, however, this utilization and disposal become the "making of one's own", when will it be related to the productive-activities of man as something that belongs to it, that is one's own? This relation will become clear, when not only appropriation will be analyzed as a technical-economic process, but at the same time attention is given to primary social and economic relations. The social-economic relation of property manifests itself mainly in the exclusive nature of property. The classics of Marxism have as a matter of course proved the exclusive nature of property in the first place for private property. In our opinion, however, this exclusiveness is a general peculiarity of property and in the one way or the other it is valid for all forms of property.[14] In general legal literature recognizes the monopolistic, exclusive character of economic property, however, in most of the cases it does not attach this character to the notion of the making of it one's own. This, on the other hand, gives reason for many misunderstandings, for through this there is a semblance as if man were related

[14] See MARX: *Das Kapital.* Bd. III. Berlin, Dietz, 1949. p. 663.

to the thing as to his own: the "own power" reflects a relation of man to the thing, and not one of man to man. In particular in Soviet legal literature the question provoked keen disputes and certain authors were even tempted to describe the power of one's own as a "psychological state manifesting itself in the head" of the proprietor.[15] On the other hand the thing is given a character of "belonging" to the proprietor, of its "being his own", because the utilization turning up as the technical and economic relation of property will, owing to the social-economic relations of property, assume a quality excluding others. The exclusive nature of property finds expression to various extents and in a various manner in the form of economic management and this expression is guaranteed also by the legal regulation.

3. A fundamental peculiarity of economic property identical with the production relations and according to what has been set forth before, of appropriative contents, distinguishing it from legal property, is the phenomenon of relativization.

Relativization relies on the circumstance that owing to the manifoldness of the technical-economic relations of property the volitional projection of property, i.e. disposal, will also manifest itself through a complexity of transmissions. Appropriation, economic division of labour and exchange of activities in like way in innumerous forms in production, exchange of goods and distribution, and so produce a variety of formations of disposal. E.g. a person leases his thing, he receives a fee for the temporary transfer of the thing for use by another: hence the lease will become for him an external form of utilization appropriation. The lessee utilizes the thing in his own economic activities (the internal form of utilizing property), or subleases it (external direction of appropriation), i.e. he, too, utilizes, disposes. To the abstract question therefore who the economic proprietor is, the reply will be, that anybody who irrespective of where ownership is vested is holding the thing in his power, exploits it, or disposes of it, in whatever respect.

Marx on a number of examples demonstrated relativization of material property. In reality Volume III of the Capital as a whole dealing with the division of profit between industrial, commercial and financial capital, is but the abstract treatment of relativization under capitalist conditions. Passages from Marx on the practical and legal form of landed property quoted earlier exactly, demonstrate relativization in its relation to immovable property. Examples may, however, be quoted also from the movements of loan capital.

Even for undeveloped forces of production there is a possibility of the division of disposal and appropriation implied in the property relations. This possibility will, however, tend to increase emphatically in the period of high technical and economic development. The political economy and also jurisprudence of socialism have clearly recognized the relativization of the right of disposal in imperialism. They have identified this right merely with the camouflaging, adulterating tendencies of imperialism striving for anonimity and so they have omitted to emphasize that this phenomenon

[15] BRATUS: op. cit. and ГЕНКИН: *Право собственности* (GENKIN: Property law) Москва, 1961, глава II.

will of necessity operate also in socialism and with the development of the forces of production gain in intensity, the more because its objective core is the degree of development of the productive forces, mass production, etc. Even in the socialist economic processes in relation to the very same natural resources a variety of appropriations may prevail, in certain relations the right of disposal will become the due of various economic agents (different economic proprietors). On the other hand there may be several economic proprietors in one and the same relation: their right of disposition and the degree of appropriation may be divided among them by ratios wide apart, and in addition these ratios may even be subject to fluctuations.

There are several authors, on political economy who in a veiled form accept the division of exploitation and disposal, i.e. of appropriation, however, restrict the designation of proprietor to one appropriator only. According to Károly Földes it is not only the proprietor who disposes of his property. In this case the criterion of propriatorship will materialize in the circumstance that the proprietor has a share in the value produced. The proprietor may provisionally alienate the object of ownership, however, if he has a share in the profit, he will be proprietor at the same time. Similarly according to Zaontrovcev possession is a derivative form originating from property: it is one of the elements of property, which under certain historical conditions may detach itself from the property.[16] In the cases quoted by Károly Földes and Zaontrovcev, however, of necessity also the other party will have disposing powers, also on his side part of the value produced will accumulate. Economically what is therefore the criterion which eventually will determine who is proprietor and who is possessor, when both economic agents equally are in possession of similar or different power of disposal and when ownership will to a certain degree become reality with both? By adducing arguments taken from political economy this qualification could hardly be explained. As an implied reply probably the one stating that the proprietor is the one whom law calls proprietor, will hold its own. The denial of the relativity of material property, i.e. the denial of the existence of several economic proprietors, will necessarily lead to a "legalistic" concept of property. For want of economic criteria they explain economic property from the outside, by recourse to elements of the superstructure.

The concept which by introducing the notion of legal property actually eliminates economic property, will necessarily lead to a situation where appropriation will become detached from material property: there will be appropriators who are not proprietors, although legal property in a number of cases adulterates the actual appropriative relations. Economic property will have to be explained from the inside. The inevitable outcome of this internal interpretation is the subjective relativization of economic property – economically anybody is proprietor who in the one way or the other or to the one degree or the other exploits and disposes, i.e. appropriates.

[16] See FÖLDES, K.: *A szocialista tulajdon és árutermelés* (Socialist property and commodity production). Budapest, Kossuth Könyvkiadó, 1968. p. 38.

The possible relativization of material property makes clear the criteria of economic property discussed earlier. There is no need for direct power for property: indirect power of any form will suffice and so a whole chain of the direct and indirect exercise of proprietary rights may come into being. Exploitation may consist not only in physical consumption: it may also consist in the creation of an income, and in the appropriation of this income. Thus economic realization and the possibility of disposal are not in any case unrestricted and exclusive: the two may be divided and so as a consequence the exclusive nature of material property will cease to be absolute. Exploitation or disposal of a certain degree, and so appropriation, will, however, be concomitant of all forms of economic property in any case.

If in respect of the given object of property (totality of objects) several material proprietors are contrasted with one another, then in the ratio of the degree of exploitation and disposal we may qualify the one or the other as fundamental proprietor, or as the one who is for the most part the "actual" proprietor. In some of the cases this qualification will by no means be a simple matter, since the rate of the rights of exploitation and disposal may vary in the different aspects and at different moments. (E.g. during the term of the lease in general the primary appropriator is in respect of the object of the lease, as opposed to the legal proprietor, the lessee. This relation may, however, change if a lease for a definite term approaches the date of expiration. Simultaneously the power of disposal of the proprietor will tend to increase and therefore in a given case he may even raise the rent, i.e. the rate of the appropriation of the profit.) On the other hand there are cases when there is a glaring shift in the right for the benefit of the one material proprietor. This was the case e.g. in Hungary before 1968 in the relations between the agricultural co-operative and the members of the co-operative in respect of land brought with him into co-operative, or e.g. of the worker who receives shares from the capitalist company (perhaps as a supplement to his wages), and who therefore is in possession of the potential right of disposal and at the same time of a claim to dividends. (In a given case the law may even declare him the proprietor of the company in the proportion his shares represent in the capital – a "declaration of a right *in rem*" was made by the Hungarian Commercial Code of 1875.) Still property held by the worker is, when the enterprise as a whole is considered, merely illusory, the fundamental disposer and exploiter, i.e. the appropriator being the industrial capitalist or group of financiers holding the majority of the capital stock.

On the ground of the analysis of economic property so far made the following may be stated:

(a) This extensive notion of material property consolidates fairly divergent social phenomena – extending from taxation to the giving of gifts, from a definite, appropriative point of view – into a single unity. We believe, however, that if the notion of economic property is used as a general fundamental category and before tackling concrete problems of property we refine this notion, this general definition will not become one distorting the facts. Phenomena which may be resorted to as

basic means of refinement are the social division of labour, the forms of property, the economic forms of property relations, and not in the last resort, legal regulation.

(b) From what has been set forth it will be obvious that although the legal proprietor is not absolutely the exclusive and not in every case the most actual economic proprietor, still in the process of relativization he will in any case be one of the proprietors, inasmuch as ownership (however it be shaped) will of necessity imply power of a certain degree and also the potentiality of exploitation and disposal. E.g. when the member of a co-operative brought with him his land into the co-operative, for this land the co-operative legally qualifying as user was in a stronger position of disposal and appropriation than the member in his position as subject of ownership. Still the legal property nevertheless guaranteed for the member a moderate potentiality of exploitation and disposal, e.g. in the form of the land rent, transmittance by heredity, at withdrawal from the co-operative some land had to be returned to him in any case, etc. In point of fact material and legal property are in a relation of more on the one side, and less on the other: the legal proprietor will always be material proprietor at the same time, still there are material proprietors, who do not qualify as legal proprietors.

The question may now be raised, how can the situation be described where the operating subject, though relativized, may be proprietor, in a relatively autonomous form may appropriate, exploit and dispose? Whereas in law the status of being a subject-at-law qualifies a person for the position of a proprietor, in respect of economic property economic segregation, or individuality will be the corresponding "home" of legal capacity. On the other hand the basis of economic segregation has to be sought for in the social division of labour.

The social division of labour is also a phenomenon of property relation. Obviously what Marx on studying capitalist society casts into a concrete form for a specific form of property, notably for private property, viz. incidentally division of labour and private property are identical expressions, in the one the same has been declared with reference to activity as in the other with reference to the product of activity,[17] will hold not only for private property. The particular elements of the social division of labour are segregated from one another and this segregation at the same time also means proprietary segregation, while the phenomenon of property of economic segregation is indicated by the relatively autonomous economic interest. Economic interest, as the interinsic active force of the proprietor is on the surface of economic life excellently suited for the indication of proprietorship and economic segregation. Although interest is not identical with the subjective concept of material property, still since interest is of necessity concomitant of all forms of economic segregation, it will as the motive of disposal point at this subjective concept.

In highly developed commodity producing societies, like the European socialist countries, entering the phase of complete unfolding of socialist development

17 See MEGA Bd. 29. Berlin, Dietz, p. 29.

and operating in a system of indirect economic planning, two fundamental forms of economic segregation are of particular importance, viz. (a) the "segregatedness of economic management" as to the central state economic management on the one hand and the commodity producing subjects on the other; (b) the segregatedness of the subjects of economy, as commodity producing units, from one another. This two kinds of economic segregatedness can be observed in the first place in the forms of economy or economic activity.

The forms of economic activity are the superficial components of the production and property relations. As regards the concrete contents the form of economic activity in its substance combines the organizational forms of economy and those of performance (economic organizations, inter- and innerorganizational relations, planning, investment, research, types of prices and wages, etc.), although literature on political economy is far from being unanimous on this question. The forms of economy or economic activity are (in general and in their concrete partial elements) mixed or complex phenomena: economic and legal at the same time. The forms of economy, as the superficial elements of production and property relations, belong to the economic basis. Since, however, they are in direct contact with the superstructure, the forms are interwoven with a number of superficial elements, among these in the first place with legal elements. The structural elements of the economic form are the institutions of economy; further the various methods of the performance of economic activities, the economic methods, incentives, the forms of financial interestedness, are mostly legally regulated, and are so economic as well as legal phenomena at the same time. Unity does not, however, mean total coalescence: the law does not bring under regulation the economic-productive relations to their full extent and to their full depth. Therefore not all superficial elements, i.e. forms of economy, will receive a legal form. The demand for a legally regulated status and the actual extent of statutory regulation are divergent for some of the elements of the form of economy: viz. partly more direct, or partly more indirect. On the other hand law is not simply a passive "outer" form: it is relatively independent and has his active role. Characteristic legal means tend to become the "economic means" of economic relations. All this complexity and relatively independent character cannot, however, affect the unarguable fact that the elements of the form of economy are in the first place of an economic and not of a legal character.

While as regards the organizational forms of the commodity relations and those of performance it is a relatively easy matter to admit the dominant effect of the economic basis, mainly legal literature erroneously qualifies economic management as a primarily superstructural category. Before the economic reforms in the socialist literature on law it was a general tendency to identify contents and methods of economic management with the classical "purely superstructural" political management. On the other hand it cannot be argued that any management of production relies on the social division of labour: it is a special form of it. The nearer the management of production is to the concrete working process, the more it will in the first

place become a technical relation, the more it will lack the superficial element, viz. the form of economy. The more we become detached from the concrete working process to a relatively growing extent, the more will by the side of the technical-economic relation the social-economic relation tend to grow, and the more will the two relations receive a form of economy in conjunction. Even within an enterprise economic forms will come into being under a variety of managements (e.g. the shop, the brigade or team, etc.), still the social division of labour, simultaneously with the development of the productive forces, demands forms of economy more and more segregated from the enterprise as concrete unit of production, forms yet more aloof from, yet still associated with the working process. Such a form of economy is in a socialist state the central state management of economy, which is in the hands of economic organizations segregated from the units of production and the essence of whose activities are the co-ordination, planning and development of the units of production. Hence economic management is one of the fundamental elements of the form of economy, where owing to the general regularity of the form of economy the economic element is the primary, the superstructural element the secondary. The mixed basis-superstructure character of economic management is, however, of a peculiar nature. Central planning and economic regulation, etc. are as for their contents undeniably economic activities, which owing to their managing character are of necessity enriched by organizational elements. Since, however, the subject of economic management is the State, this economic and organizational activity will tend to develop to public administration: the contents of public administration organizing economy are of an economic character, still these contents find expression in elements of the executivce power of the State: they are translated into reality by governmental agencies.

If economic segregation built on the social division of labour is conceived as a proprietary category, then the fundamental types of economic segregatedness, so economic management and commodity relations will equally, in a specific, divergent form, have yet to express economic property.

In the classics of Marxism the proprietary character of the commodity relations can hardly be argued: this notion is to the end and consistently used as proprietary category. The problem has its origin in the fact that Marx and Engels identify the commodity relations with a concrete form of property, viz. private property. On the other hand in their prognostications regarding socialism they believe that there will be no more commodity production or production for the market. The circumstance that the classics identify private property and commodity relations, whereas contrary to the prognostications there are nevertheless commodity relations in socialism, part of the literature has been tempted to deny the proprietary character of socialist economic segregatedness and commodity relations, at least as far as the state sector of economy is concerned. As long as in the state sector the commodity relations were in conjunction with enterprisal segregatedness mere technical categories, this position could not be interpreted as a breakage in the principle: as a matter of fact quasi

commodity relations of a technical character, or the form of commodity, had not even to be of a proprietary character. If, however, the existence of genuine socialist commodity relations are recognized even in the state sector, then inevitably contradictions will turn up. This is well illustrated by experiences taken from history: as soon as the shortcomings of the system of strict planning have thrown out the idea of a socialist economic reform, the release of the shackles of the commodity relations originating from the breaking down of the plan, the dispute has started and is still going on concerning the causes and the proprietary nature of commodity relations in socialism. The doctrine is, however, making headway more and more according to which segregatedness of a commodity nature is not tied to the existence of private property, and owing to the degree of development of the forces of production it has to exist of necessity even in socialism. On the other hand the recognition of the real socialist commodity relations has with a large section of the authors led to the denial of the proprietary nature of the commodity relations. Many are of the opinion that for commodity relations there is no need for proprietary segregatedness and on this understanding a line is drawn between proprietary and non-proprietary segregation.[18] This position is wrong because it identifies legal property with economic property. "For every commodity relation there is need for an interrelated social division of labour", further "for a form of property which brings about the segregatedness, or economic independence of the producers or productive units."[19] In other words there is no exchange of goods or barter without proprietors of goods, and commodity relations are even in socialism of necessity and exclusively relations of material proprietors. If there are real commodity relations between two economic subjects, the subjects will in these relations become economic proprietors.

Still in the same way also the proprietary nature of segregatedness in economic management may be established. After the introduction of the economic reform in Hungary, when for the first time a legal differentiation of the contents of economic management took place, it has become a general policy to restrict the proprietary rights of the state in respect of state enterprises, in a manner detached from the authoritative rights of economic influencing, to the so-called enterprisal supervisory rights of the government department or local government council founding the enterprises.[20] If on the other hand by property disposal appropriation is understood, then e.g. the income regulation performed by non-supervisory upper agencies, or the

[18] See FÖLDES: op. cit. p. 177; OSTROVITYANOV: *Áru- és pénzviszonyok a kommunizmus építésének időszakában* (Commodity and money relations in the period of the building of communism) Hungarian edition. Budapest, Kossuth Könyvkiadó, 1963; BRUS, W.: *A szocialista gazdaság működésének általános problémái* (General problems of the operation of socialist economy). Hungarian edition. Budapest, Közgazdasági és Jogi Könyvkiadó, 1966. p. 112.

[19] See BÁNYAI, M.: *Politikai gazdaságtani alapismeretek* (Fundamentals of political economy). Budapest, Közgazdasági és Jogi Könyvkiadó, 1969. pp. 34–35; similarly VILMOS, J.: *Áruviszonyok a szocialista gazdaságban* (Commodity relations in socialist economy). Budapest, Kossuth Könyvkiadó, 1963. pp. 10–44.

[20] See SÁRKÖZY, T.: *A gazdaságirányítási jogosítványokról* (On the rights of economic management). Jogtudományi Közlöny, 1/1973.

distribution of profits accumulated at the enterprise between the state budget and the enterprisal funds could hardly be excluded from the proprietary rights of the state. All this means that in the full cross-section of national economy the disposing and appropriative activity manifesting itself in any legal form, i.e. activity displayed either in a statutory form or by way of economic influence, and performed by anyone of the governmental agencies, will have to be qualified as the exercise of proprietary rights by the State.

5. The forms of economic segregatedness are closely tied up with the forms of property.

The form of property, between the general notion of property and the individual property relations, occupies a position on the level of the philosophical "particular", and is the abstracted expression of the typical traits and essential pecularities of property relations of a similar character, and classified on given considerations. The material form of property is an autonomous economic phenomenon. Among the material forms of property some may appear even legally as forms of property, still the economic and legal forms of property may be far apart from each other.

There are several possible types of the forms of property according to the nature of property relations made subject to a study, or according to the considerations on which classification is carried through. Literature of economy and philosophy in general regards only groups or classes of property formed on subjective considerations as form of property. This is somewhat of a simplification and in our opinion incorrect.

The principal groups of the definite totalities of the property relations, or forms of property are

(a) when classified by the subjects of the property relations, the subjective forms of property. The subjective form of property, first, expresses the essentials of the personal properties of the given group of proprietors, and, secondly, the other way round, defines the persons (layers of society) excluded by the very type of property relation from appropriation. Owing to these traits the subjective form of property lends itself excellently for the exploration of the *social aspects of the economic-productive relations or the property relations.* If the subjective form of property is appropriately segregated from the other groups of the property relations and if it expresses primary social structural relations, i.e. class relations, then, with Ference Tőkei, we may speak of a real subjective form of property;[21]

(b) when classified by objects, the property relations will become in the Marxian terminology *kinds of property.* The kind of property indicates the character and the value in use of the natural goods exploited by the proprietor.

[21] For the analysis see TŐKEI, F.: *A társadalmi formák elméletéhez* (To the theory of the forms of society). Budapest, Kossuth Könyvkiadó, 1970. This work has been consulted by the author in the first place.

The forms of property by subjects and so also the kinds of property by objects have primary and secondary forms. The secondary forms are small groups within the primary basic form (e.g. within the co-operative subjective form of property the property of agricultural co-operatives will figure as a secondary form, etc.). In the course of historical development the primary and secondary forms undergo frequent changes, occasionally they will be overlapping, so e.g. landed property, which for a very long time was a fundamental kind of property has become in capitalism one of the sub-species of the capitalist property of means of production, etc.;

(c) the group of the property relations by functions are the functional forms of property. As has been seen here essentially we may distinguish three forms of property, viz. natural property, commodity property and property of the public executive power and economic management or executive-managerial property. In a very general way natural property may be defined as a form where within the framework of property nexus, owing to the one or the other peculiarity of the use-value of the object of property or to economic-social-political-legal relations, the object of property is exploited void of commodity character, or at least in a way where the commodity character is fairly subordinate. The natural form of property, existed e.g., until the advent of capitalism, in respect of landed property. This applies, to the ownership of the means of production under the so-called direct socialist planned economy. Actually the natural character is predominant at the exploitation of a considerable part of goods for personal consumption. The latter example indicates that the natural form of property easily changes over to commodity property, or will, in general partially, for some detail or potentially possess a commodity charachter. Obviously in the case of commodity property distinction has to be made between simple production of goods and such based on modern large-scale industry. On the other hand it should be remembered that commodity property strongly blurs the dividing line between the subjective and objective forms of property: according to the laws of commodity property it is almost immaterial who the person exchanging it is, and what he does exchange. The third functional form of property is the public executive-managerial property which substantially is the interference of the State in economic life, and where the State, in its economic organizational-guiding activities, combines into a unity the exploitative-dispositive and appropriative relations. In general the public executiv-managerial activity is usually not considered a form of property. As will be seen the unfolding of the economic and legal-features of this functional form of property is attempted by authors who intend to have political or state law property recognized as a new alternative of the socialist notion of property.

The subjective and functional forms of property, on the one part, and the objective kinds of property are in dialectic interrelation with one another: their special interrelations bring about the charachteristic type of property of a social-economic configuration.

After the foundations of socialism have been laid, the following will be characteristic of the property relations of a "developed", "mature" socialist society advancing towards the complete building up of socialism:

(a) In principle all groups of subjective property relations are equally of a socialist character: there are no divergent types of property, i. e. even the individual ownership of means of production will, in so far as it survives and operates as directed by the socialist State, be of a socialist character.

(b) No real subjective form of property exists any more. Although the particular groups of property may be kept apart by subjective criteria still, e.g. state ownership owing to its all-national character does not only exclude the citizen, but also draws him into sphere. The economic activities and the ties of economic management of state enterprises and co-operatives vigorously approximate each other: even any surviving differences will cease to manifest themselves as differences of genuine property forms.

(c) In respect of the consolidating of the foundations the technical-economic relations of the socialist property relations will come more and more into prominence. After the question of "who defeats whom" has been decided the technical or otherwise, the positive side of the property relations will become the substance of the socialist type of property.

(d) One of the most characteristic traits of the socialista property relations is from the very outset the conceptual segregation of the types of property of the means of production and of the consumers' goods. This basic difference will to a certain extent be increased, and to a certain extent decreased, by the two intertwining different tendencies, viz. the turning into reality of commodity production, and the higher degree of concentration of the productive forces owing to technical development. Simplified "natural-technical" formal commodity relations are superseded by true socialist commodity production throughout the whole cross-section of national economy. Consequently the exploitation of the natural resources will become more and more of a transmitted kind, relativized, and of an income-appropriating character. With the completion of the collectivization of agriculture, the quasi-enterprisal operation of the co-operatives and the appearance of associations, even in socialism the large-scale industrial property will become the fundamental form of the now clear-cut commodity-formed ownership of the means of production, leading at the same time the dual problem of the exercise of ownership rights both as to the working process management within the large-scale enterprise, and as related to the enterprise as a whole. The ownership of the means of production of large-scale production lays a stress on the characteristic differences between social and personal property. At the same time owing to the development of commodity relations and technical development the restrictive interpretation of the material sphere and method of exploitation of personal property loosens, which on the other hand signifies a certain approximation within the general framework of the commodity form.[22]

[22] E. g. the Hungarian Land Act of 1967 in enclosed gardens and in the downtown districts qualifies as personal property landed property which can in no way be included in the traditional notion of personal property.

(e) The socialist international integration and the intensive foreign trade relations with the capitalist and developing countries, if in its germs only, yet in a more and more accentuated form raises the question of forms of property associated with international enterprises or associations.

(f) An immanent trait of the socialist type of property is the decisive role of the public executive-managerial functional form of property as managed by the State in the economic life of society. Without the slightest decrease of the significance of the functional form of property managed by the State, a qualitative change is taking place in the economic form of the public executive-managerial functional form of property: direct economic management is becoming an indirect one. When the end of the period of reconstruction and the transition into the trend line of undisturbed economic development, further the exhaustion of the possibilities of an extensive economy and the need for the change to intensive development coincide with the social conditions of the complete building up of socialism, in the absence of extraordinary international developments, the imperative change-over to indirect planned economy is gradually becoming a general regularity under the circumstances of the European peoples' democracies.

The end of the socialist economic reforms is a common one: the proportionate and harmonious linking up of the central state economic management and the commodity producing enterprisal economy. The economic and legal formation of these two spheres and the way of their being linked up presents divergent typical variants in the socialist countries. Accordingly we may speak of the two subspecies of indirect planned economy, viz. of the decentralized course and the course of planned market control.

Essentially the decentralized course (a) builds the reform on the dominant role of the middle level guiding agencies (associations, trusts) or of the large enterprises (combinate, main enterprise) both exercing guiding-directing and operative economic activity at the same time; (b) improves national economic planning by decentralization, the radical cut-down of plan indices, and the building of the remaining indices on value categories; (c) on combining the extension of the financial incentive and financial autonomy to economic management with the introduction of the planning-organizational elements into the commodity relations, develops the complex planning-organizational-financial relations.

The course of planned market control does not decentralize the general (usually upper level or macro-economic) guiding-directing function and the enterprisal level operative economy in conjunction, but by the side of complete decentralization of the latter centralizes the former. The level of the macro-economic management and enterprisal level break away from each other in quality: the guiding function of the State in economic policy is discharged in the traditional framework of public administration and it becomes reality through statutory or economic regulation. Hence the plan indices are not obligatory for the enterprises at all, and the macro-economic management endeavours the limitation of the middle level, mixed managerial

(guiding-directing and operative) agencies, or large enterprises as well. The commodity producing state enterprise operates as the basic type of the socialist economic organs, viz. as an economic enterprise. Enterprisal interest is not directly state interest, the enterprise cannot be responsible for the performance of direct governmental functions. In this system the interest of national economy is the market mechanism, the wholesome, widespread expansion of market competition.

The two types of economic management of indirect socialist planned economy, established in a legal manner, exercises a decisive influence on the construction of the socialist notion of ownership in the sphere of social property.

III. The possible plurality of the notion of ownership and the respective determining factors

The fundamental principle of the interrelations of the economic and legal meaning of property appears in legal literature often in a distortedly simplified form. Simplification, in the wake of Plekhanov, dates back to the initial phase of the socialist theory of law, and is virulent even today. Essentially it is the position according to which, there exist direct relations between property relation and ownership, ownership being the most direct legal expression of the production (property) relations: "ownership is undoubtedly ideological, however, the first, we may say the lowest stage of ideology." One of the resultants of the erroneous thesis of the direct relationship of ownership and production relations is the incorrect interpretation of ownership in commodities as a fundamental and primary institution of law. Since this ownership was recognized as the characteristic institution of civil law, it served as a new and now "socialist" recognition of the civil law as a sort of parent law inherited from capitalism.

The most direct expression of the property relations is not the institution of ownership, but the superficial element of the property relations i.e. the form of economy of a mixed basis-superstructure type. The regulating effect of the law becomes integrated into the economic form and in this way exercises an influence in the direction of the property relations. It is for this reason that a distinction has to be made between the legal regulation of the property relations spreading over the whole economic form and the institution or institutions of ownership, which is or are attached to the definite central element of the economic form.

It is the particular function of the law to stabilize, crystallize the particular economic forms of property relations, and to fix them in a relatively static form. Secondly, with its refined means the law shall advance the fullest unfolding of the technical-economic relations of the property relations and of the new type social-economic relations intertwined with them. The refining tendency of the law mainly exploits that feature of the law that the economic attitude producing one and the same economic result may in the light of law appear in different alternatives of the legal dogmatics, or normative structures. The law is capable of giving expression to

one and the same economic process in a number of variations in the first place because law is differentiated by branches and the method of regulation of the particular branches of law is divergent: the particular branches of law bring under regulation the economic phenomena with their specific means differing by branches and institutions of law. Obviously the method of regulation will in the last resort be influenced by the social relations constituting the subject of regulation, still this is but an ultimate interrelation and the law has a fairly extensive freedom of the choice of the means of regulation and normative structures.

If the differentiation by branches of law is now ignored and every property relation identic with the economic-productive relations brought under legal regulation is, with the general features of the law added, transferred to the field of law, this will in the event of a consistent enforcement lead to the abandonment of the institution of ownership. The Yugoslav social concept of property, that of the subjectless social ownership substantially reflects this comprehensive transmission: "social property is not a category of the law of property, but a relation and process; accordingly there is no social ownership either, the word property has survived only because there is no more appropriate for it, social property is a complex congeries of rights and obligations belonging to the various branches of law." In connexion with the Yugoslav concept we would remark that not even the Yugoslav system carries through the subject-lessness and legal independency completely: first, it does not extend it to the financial relations of associations and the citizens, secondly, statutory law by resorting to the category of the right of use of the nature of the right *in rem* (as the substitute for the quasi commodity ownership) more or less vitiates the subject-lessness and legal independency even within social property. There is more than one example for the theory of ownership formed by way of the "wholesale transfer" of the property relations to law even in western legal literature, mainly through the tendencies of imperialism directed to the resolution of classical ownership. Kruse's process, to work into the concept of ownership practically all other rights of material or financial nature, is generally known.

Hence what the refining tendency of law expresses is that whereas economically there is scarcely a difference between property and property relations, in the law the legal regulation of property relations have to be kept apart from ownership as an institution of law. The law selects a central relation, or more, from among the legally regulated property relations and brings it as ownership under regulation. At a comparison of material property and ownership the difference should not be looked for simply in the general characteristics of the law: attention has to be given to the concrete structural peculiarities of the notion of ownership in a peculiar manner formed within the legally regulated property relations. To be looking for the difference between property and ownership merely in the general characteristics of the law is a significant simplification equally wide-spread in the literature on law as well as economy. This erroneous doctrine theoretically relies on Marx's distinction between the objective character of property and that of its volitional relations and ignores the

fact that this Marxist thesis emphasizes the fundamental divergence only, and owing to the relative independence of the law, further to the peculiar appearance of ownership within the group of legally regulated property relations, there is a number of other differences also between the economic and legal notions of property. In the same way as economic property, too, disposes within the sphere of production relations of special appropriative peculiarities, so ownership is not "merely" a legally regulated property relation, but a central institution of law formed of a specific technical- and sectoral structures of law, and relatively differing from other legally regulated property relations. Ownership is not "in general" the law, but a "special" law. Ownership "imposes" a duality of peculiarities on material property: viz. the general peculiarities of the law, and its "special" peculiarities of ownership within the law.

Hence the law selects a central relation, or more, from among the legally regulated property relations, and brings it or them as ownership under regulation. Whether or not a single concept of property or several differing from one another will take shape, or on what considerations the law selects the central property relations, or what sectoral and technical equipment of law it will use to raise the central property relation to a primary legal relation, will in each case depend on the material forms of property of the given social-economic configuration, or on the forms of economy constituting the superficial element of these material forms. The notional (sectoral, structural) shaping of ownership will basically be determined by the functional and material forms of property, or the economic forms of them.

The sphere of legally regulated property relations, further the institution of ownership preferred as a special group of legally regulated property relations, first, undergo changes in the course of social evolution, secondly, ownership may in accordance with the functional material forms of property and economy of the given social and economic system be shaped by legal methods differing from one another. Thus in a given case we may encounter the co-existence of notions of ownership of divergent notional contents and structure, possibly of divergent sectoral character. Provided the notions of ownership of divergent contents are delimited in a satisfactory manner and defined in an unambiguous form, the notional plurality of ownership first, will not be, a theoretical absurdity (let us recall the sectorally divergent notions of a common root, yet legally differently established, of legal liability), secondly, will be a historical fact verifiable by the course of evolution of the institutions of ownership.

So far the overwhelming majority in socialist literature on civil law has point blank declined to recognize the notional plurality of ownership and declared the civil law commodity ownership as being an exclusive ownership institution (exclusively potential ownership) of the basic institution of the socialist legal system and handled commodity ownership (although only one of the possible alternatives of the notion of ownership) as the sole legal notion of quasi eternal validity, whose contents are so to say once and for ever obligatorily settled. Against this position essentially adopting the western notion of commodity ownership shrouded in ideas of "natural law" and

claiming exclusiveness in the latest socialist literature on economic law the extreme has stood up which denies any potentiality of the general concept of ownership, the abstract *a priori* notion of ownership, namely the notion of ownership independent of the concrete forms of ownership.[23] In our opinion if there are concrete typical forms of ownership, there must of necessity exist a generalized notion of ownership, however, of such a generalized notion of ownership there may be several. The parallel running of a plurality of notions of ownership is in point of principle possible, yet not of absolute necessity, in all systems of economy. As has been seen, the origin of plurality, the number of notions of ownership, the sectoral character of the notions, their structure, etc. fundamentally depends on the functional material forms of property and on the economic forms of these forms of property. However, the actual coming into being of this plurality is to a great extent influenced by ideological and historical factors, legal tradition, etc.

IV. Plurality of ownership in non-socialist societies

In the economic system of Antiquity a concept of ownership became established in the ancient law of Rome which as for chattels recognized an extraordinarily unrestricted absolute right, as for landed property or real estate created relative rights segregated by functions (Kaser), interwoven by political elements (Bonfante), and existing in parallel side by side. With the growth of the Roman slave-holder society, the development of genuine market economy, the relaxation of the restrictions attached to the *ager publicus,* in Rome the indivisible and uniform full-scale commodity ownership became established. The commodity relations partly insisted that the law safeguarded the interests also of the party of opposite interest, partly forced the owners by a variety of transactions to accept self-restrictions to the prejudice of their ownership. For both chattels and real estate ownership equally and uniformly developed into the fullest law of property. However, partly ownership ceased to be a wholly absolute right (it was burdened equally by statutory and contractual obligations), partly various rights existing on real estate, earlier parallel to one another, henceforth rested on ownership, and developed to genuine easements or other rights *in rem.* Commodity ownership of Roman law come into being as a uniform and fullest category of property law became in the German (feudal) method of production fairly limited and also a notional duality of ownership was born. Whereas for chattels commodity ownership of Roman law largely continued to live, for real estate a specific, divided chain of ownership fraught with elements of sovereign power became established. Feudal ownership in land, where the elements of the sovereign

[23] E. g. according to STELMACHOWSKI there are as many forms of property as there are notions of ownership. *Wstep do teorii prawa cywilnego.* Warszawa, 1969. pp. 239–241. According to LÜBCHEN no definition of general validity can be offered for ownership, as any such attempt at generalization would end in a meaningless abstraction. *Aufgaben und Gegenstand des künftigen Zivilgesetzbuchs.* Neue Justiz, 18/1969. According to OBERLÄNDER-POSCH the abstract definition of ownership includes unscientific, banal definition, the private law notion of ownership "is the prototype of an unhistorical approach". *Probleme der rechtlichen Regelung des Volkseigentums.* Staat und Recht, 12/1969. Part II.

power, feudal dependence and bondage had their respective parts assigned to them, consisted of the permanent and stratified bi-personal mutual services in a system of sub- and superordination. These services partly split up the rights under commodity ownership of Roman law, partly incorporated right *in rem* and also obligations in the meaning of Roman law. (E.g. the law of real estate of the Prussian Landrecht, the Austrian Civil Code and the Baltic Code implied this divided ownership.)

On the other hand capitalist development again restored the uniform commodity ownership of Roman law freed from elements of the sovereign power. The Code civil, and also Continental legal literature returned to the definition of Roman law of ownership in its period of maturity declaring that generally recognized ownership was the fullest and most exclusive legal rule which could be exercised over a thing within the limitations of statutory law and without the violation of the rights of others. In connexion with the ownership of capitalism of free competition it should be noted

– that although in the initial phase of transition to capitalism there were tendencies towards the absolutization of the fullness of ownership, capitalist law adapted ownership as understood by mature Roman law, ownership was fullest and most exclusive only as compared to other rights of property and not in an absolute sense;

– that the notion of ownership of Roman law was the notion of ownership of simple conditions of commodity production; it was a right tied to things defined relatively closely and in a concrete form, or to definite persons; large organizations of work, commodity relations of a certain complexity were typical neither in Rome nor in the beginning of capitalism of free competitions;

– bourgeois ideology clad the institution and structure of commodity ownership taken over from Roman law in the guise of natural law: it considered only this institution ownership, and did not qualify feudal ownership as genuine ownership, since in an unhistorical manner it enveloped this too with criteria of commodity ownership. Western literature did the same to ownership forms of capitalism of a non-commodity ownership structure, thus e.g. in the wake of Jhering it qualified the *domaine public,* the rights formed by French law in respect of assets for public use (public roads, squares, etc.) at most as quasi property. In reality these assets had no proprietor (subject-less property – public administration being a steward only). The ownership of the State in respect of its assets in trade, the *domaine d'Etat,* was also kept apart distinctly from for the purpose of trade other *domaine public*;

– that finally commodity ownership had not gained exclusiveness in several countries where capitalist development was clogged with substantial feudal elements, like in Russia or England. In Russia the institution of the so-called *obshtchina* barred commodity ownership from its complete extension to landed property. In England "owing to the premature freezing of the law", there is a sharp line between ownership in movables and immovables. The Roman law concept of ownership is applied to movables only, whereas in respect immovable of great variety are in cur-

rency, so ownership unrestricted in time, temporary ownership, ownership for life, entailed ownership, the different forms of trust, etc. Even more complexity has been introduced into the system owing to the duality of common law property and equitable property. The notions of property and possession are indistinguishably coalesced; there can hardly be talk of a segregation of substantive law and contract law in the Continental meaning of the terms. Incidentally the multitude of the institutions of ownership of English law is one of the most convincing proofs, first, of the coexistence of several institutions of ownership, and, secondly, that feudal ownership in land had not only a single German type, predominant on the European Continent. Finally the law is capable of converting a strongly relativized economic property into ownership. This means that the English concept of ownership is the legal reflection of the relativization of economic property as opposed to the "naturwüchsig" bourgeois commodity ownership: proprietor and lessee (tenant) are in the concept of English law equally proprietors, because they may mutually exclude each other from the exercise of certain rights.

The structure of commodity ownership well suits imperialism. Since, however, in monopoly capitalism it is not simply commodity production that is going on, within the structure substantial changes in ratios will take place. In the sphere of property of the means of production appropriation is taking place through extremely variegated technical and economic connexions, the relativization of material property is expanding at an extremely high rate, so that the *régime* of the estate is relieved by the *régime* of value. In appropriation the physically graspable object constituting the object of property is becoming more and more indirect: the same plot of land is for the worker an implement, a tool, for the lessee (tenant) a source of profit, for the proprietor a source of rent, for the mortgagee or lienor a substratum of interests. The ties between thing and person slacken, therefore the object of commodity ownership tends to expand (intellectual property, property in rights, organizations as objects of ownership, etc.), the partial rights of use and disposition of ownership part company permanently and become rights for and by themselves, the obligations tend to increase enormously, commodity property economically becomes relative to a very high degree, so that commodity ownership also for practical purposes approximates contract law (e. g. the property of the shareholders has in reality ceased to be ownership and has developed to a credit relation). Still this has happened for practical purposes only, for in principle the commodity ownership structure, which has in the internal economic point of the matter undergone a change, has remained unchanged. A large portion of the obligations are regarded as being of a public law character and the principle of the elasticity of commodity ownership parries the preponderance of obligations.[24] The reason is that the economy of imperialism is also a commodity producing economy, for that matter a monopoly capitalistic commodity production, and the exigencies of commodity production, notwithstanding the internal modifications, preserve the basic structure of commodity ownership.

[24] E. g. see RUDOLPH, K.: *Die Verbindungen des Eigentums.* Tübingen, Mohr, 1960. p. 124.

V. Potential plurality of ownership in a socialist society

When now the opinions brought forward on commodity relations in the direct economic mechanism are considered, at the first glance it will be surprising that even socialist law has conceived the institution of ownership both positively and theoretically as commodity ownership, although in general without giving prominence to this circumstance. In the literature of the sixties civil law ownership recognized as exclusive institution of ownership was with one voice declared to be of the nature of commodity ownership.[25] Several objective as well as subjective reasons may be adduced to explain why the socialist concept of ownership has applied to social property, and within it to state property, uniformly, structurally and formally the classical capitalist notion of ownership, however, by discarding the theoretical relaxations of ownership of the era of imperialism. The reasons are briefly the following:

– in the initial phase of socialist construction, with validity for national economy as a whole, economy is going on in a commodity form, however, in the form of commodity relations narrowed down and almost of the character of natural economy. There is no circulation of capitals, trade in means of production is practically nil, money, prices, etc. are mainly of a technical character. Hence the commodity form of economy justified the commodity ownership structure, still commercial relations transacted in a farily technical manner, in the form of exchange of natural goods, favour the legal solution of questions of ownership of the first phase of capitalist evolution;

– there is perfect unity within the state sector, the State is in reality a producer, economically the state enterprise is not segregated from the governmental machinery and so the doctrine prevails that genuine commodity relations exist on the borderlines of the state sector only, where strictly speaking the State represented by its agencies enters as a whole into commodity relations (this idea was expressed most appropriately by the barter concept of the early Soviet legal literature, and substantially this is implied in the theory of state ownership advanced by Venediktov);

– owing to the integration of the European socialist countries in the Romanistic legal culture transmitted by the German Pandekten-jurisprudence and the inclination of legal dogmatics to the traditional, historical, dogmatic and ideological traditions has much to say.

Hence the survival of the classical commodity ownership in the socialist legal system may be substantiated by the circumstance expounded earlier that ownership regulates property relations through the form of economy: in point of fact the form of economy was the commodity form simplified in socialist direct planned economy and

[25] E. g. in Hungarian literature: VILÁGHY, M.: *Az áruviszonyok és a polgári jog* (Commodity relations and civil law). Allam- és Jogtudomány, 3/1968. p. 472; in Soviet literature: GENKIN: op. cit. pp. 11–13.

fairly well approximating natural economy; this was the form which directly determined the legal structure and the final evolution of legal dogmatics.

The socialist adaptation of the classical notion of commodity ownership ruled absolutely to the end of the fifties and the beginning of the sixties. Opinions disagreeing with it furned up sporadically in Soviet literature (e.g. that of Mikolenko, Karass, Ketchekyan), however, without any particular theoretical effect. After the foundations of socialism had been laid, in the process of reforms of socialist planned economy a growing number of contradictions of a dogmatical nature made their appearance when it came to apply the notion of commodity ownership to the sphere of social property. The contradictions were triggered off by the appearance of new-type socialist functional forms of material property (or forms of economy), which called for the formulation of new-type notions of ownership. Owing to the intensification of the contradictions from the mid-sixties onwards gradually, in the face of the resistance of the partisans of the traditional notion of commodity ownership, in the first place in the literature of the German Democratic Republic, and so also in Polish and Czechoslovak literature, vigorous attempts were made at the supersession of the classical commodity ownership in the field of social property and at the formulation of a plurality of ownership which by preserving commodity ownership within a definite sphere (e.g. in that of personal property) would create specific socialist ownership structures for social or state property. By the side of the notion of commodity ownership, in agreement with the relatively differing sub-forms of the indirect form of socialist planned economy two new, different notions of ownership have been formulated, the notion of structural ownership and the notion of ownership defined by public (constitutional) law.

(a) The dogmatic solution of the structural notion of ownership, too, may be traced back to the dispute on state ownership in the Soviet Union: Mikolenko represented structuralized ownership against Venediktov. His doctrine received the support of Reyhel. At the end of the fifties the doctrine was revived by Ketchekyan.[26] This theory of a structuralized ownership, at the time of its origin misunderstood and as a theory of divided ownership emphatically rejected, was adopted and improved by the literature of the law of economy revived in the second half of the fifties, simultaneously with the vertical expansion of the system of independent accounting, and the socialist economic reforms operating through the reinforcement of medium-range management. The dispute on state ownership, which is going on in the German Democratic Republic ever since 1964, by setting out from a slight modification of the traditional state ownership structure of Venediktov on lines of economic law tends more and more determinedly towards a fully unfolded struc-

[26] For MIKOLENKO's doctrine see: *Állami jogi személyek a polgári jogban.* Hungarian edition in: Szovjetjogi cikkgyűjtemény, 12/1951. For the position taken by КЕЧЕКЯН: *Правоотношения в социалистическом обществе* (KETCHEKYAN: Legal relations in the socialist society). Москва, 1958, стр. 109—112.

turalized ownership of economic law. There is a number of followers of the doctrine of structuralized ownership of economic law also in Czechoslovakia and Poland.[27]

The essence of structuralized ownership may be summed up as follows:

– a distinction in point of principle and structure should be made between social ownership in respect of the means of production and private ownership in respect of consumers' goods;

– to the private ownership of citizens the notion of classical commodity ownership should be applied substantially unchanged in respect of both the object of ownership and the partial rights of the contens of ownership. Social ownership and so state ownership, since neither of them bring under regulation relations of a commodity character, or at least not purely, do not even belong to civil law. State ownership is dynamic, positive, and the complex sectoral unity of rights and obligations, and not governing chattels, it is not static, exclusive, or of a protective nature, nor of negative contents or of absolute structure;

– state ownership is the totality of rights and obligations of the most heterogeneous organs, central governmental agencies, associations of economic management, and enterprises belonging to a variety of branches of law. It is through these legal relations that the uniform total of all-national appropriation becomes a reality. These various rights and obligations are parts of the structuralized state ownership disposing of relative independence, parts which are in the total-part dialectic connexion with ownership as a whole. There is a number of ideas in vogue as regards the inner arrangement of the structure. We may refrain from giving the designation of ownership to the partial rights on the understanding that these partial rights constitute structuralized state ownership only in their unity. On the other hand it is permissible to qualify the partial rights of certain governmental agencies or enterprises as ownership in both economy relying on compulsory plans (Mikolenko, Ketchekyan), and indirect planned economy, thus giving expression to the extension of enterprisal rights (e. g. Stelmachowski, etc.). In like way there are several possible arrangements in the mutual relations of the organs taking part in the structure: the coalescence of the organs of public administration and enterprises on the ground of rigid statehood (Mikolenko), or by giving up the traditional statehood (so the writers on economic law denying the traditional political character of economic management and of the enterprise, further those approximating economic management to the enterprise by vertically extending the system of independent enterprisal ac-

[27] The most prominent representatives of structuralized ownership in the German Democratic Republic are: MÜLLER, K.: *Zur Struktur des Volkseigentums.* Vertragssystem, 3/1968; LANGER-(PFLICKE)-STRECH: *Volkseigentum und Stellung der Betriebe.* Staat und Recht, 3/1967; in Czechoslovak literature: HANES, D.: *K pravnemu postaveniu statneho podniku v podmienkach prehlbovania principov sustavy ekonomičkeho riadenia* (Legal status of the state enterprise under the conditions of the intensified principles of economic management). Pravny Obzor, 3/1968, and op.cit. Pravnické Studie, 2/1968, further SPIŠIAK: *Novy model státneho socialističkeho vlastnictva* (New model of state socialist property). Acta Economica Univ. Komenskeho, 1968, and op.cit. Pravnické Studie, 1/1968. In Poland: STELMACHOWSKI: op.cit. p. 228–241.

counting), finally to adopt the doctrine that the agencies and enterprises of economic management taking part in the structure represent ownerships of a variety of types; the commodity property of the agencies of upper level economic management being of a public law, that of the enterprises of a civil law nature (Spišiak). Unlike the earlier two doctrines which exclude commodity ownership from state property even on the level of the partial elements of this property, the last mentioned doctrine signifies that the traditional commodity ownership operates as a relatively independent partial element of a structuralized ownership.

Structuralized ownership is one of the new alternatives of the socialist notion of ownership: it has as its goal the union of the proprietary segregation of two different types, viz. the economic segregation of economic management and commodity relations simultaneously, namely up to the limit of the potentialities of legal regulation and so it will of necessity designate rights and obligations belonging to the most heterogeneous branches of law and reflecting appropriation as ownership in an economic legal relation. Structuralized economic-legal ownership is wrong not *a priori,* but in our opinion its applicability depends on the degree of coalescence of the two typical, in point of principle differing variants of material property or functional form of property, viz. general (upper level) economic management and commodity relations, in the state sector. If the commodity elements are implied in the means of general management, on the other hand in the commodity relations managerial traits appear to a considerable extent, then socially and economically economic-legal structuralized ownership may in reality emerge as a new-type ownership by the side of commodity ownership prevailing in the "pure" commodity relations. If this coalescence fails to come about, the notion of structuralized ownership will be distorting and the economic-legal relation will qualify as an erroneous abstraction.

(b) Originally no particular dogmatic significance was attributed to the constitutional regulation of the forms of property in the socialist theory of law. Literature of constitutional law did not bring into question that the constitutional regulation meant merely a stress laid on the political significance of the forms of property, whereas the detailed legal regulation affecting ownership as a whole belonged to civil law, the branch of law in the subject-matter and method of regulation most adequately reflecting the commodity features in the sphere of financial relations. Hence ownership has no separate constitutional and civil law notion, and its appearance in the constitution is notionally meaningless. Public law picks out a few elements of civil law ownership which are associated with the forms of property, and owing to their political character brings them under regulation in the constitution. These constitutional rules are, however, what may be called transmitted norms of political law and so there is complete unity in the regulation of the ties of political and civil law ownership.

In the latter years criticisms made their appearance doubting the so-called public law notion of the constitutions, according to which by the constitution only the economic guarantees of sovereignty should be defined. Simultaneously with this

tendency attempts were made to clarify the provisions of the constitution governing ownership. These attempts gradually developed to the formulation of the independent public law notion of ownership. The public law category of ownership was shaped by literature on two mutually independent theoretical bases.

The first tendency deals with the level and extent of the legal regulation of property relations. According to the Polish authors, Wasilkowski and Stelmachowski, in the 19th century the domination of civil law notions of ownership was wholly justified in jurisprudence. However, in the 20th century this concept is equally obsolete in both capitalism and socialism. The legal concept of property manifesting itself as a highly complicated psychological, economic and legal concept, equally has a wider ad narrower meaning according as it relates to assets or a specific thing. In the first instance, in the meaning of the constitution, we shall have the case of property of public (state) law, in the second of one of civil law. In the particular branches of the legal system the notion of ownership may emerge equally in the wider and narrower sense. E.g. in criminal law the notion of social property will be attached rather to the wider, that of personal property to the narrower interpretation.[28] Another part of the literature goes even further noticing that the constitutional and civil law notions of ownership differ not only by the subject-matter: there is also a functional difference between the two notions. According to Professor Mihály Samu state law "incorporates the general rules of the institution of ownership, which appear with peculiar legal solutions in the law of public administration, in civil law, in co-operative law." In other words Professor Samu recognizes a general property of state law, with different ownerships essentially segregated by branches of law under this heading, ownership which on the whole Professor Samu forms on the ground of the theory of economic law: the financial conditions of the socialist organizations differ from those of the citizens. Therefore by the side of civil law commodity ownership governing the latter new types of specific ownerships spring up, such as state ownership, co-operative ownership and enterprisal ownership, all of which do not anymore come within the province of civil law.[29] Unlike Professor Samu, S.S. Alekseev carries through the classification of property of general political law and of the ownerships of the particular branches of law in a manner free of the infiltrations of economic law. According to Alekseev the law brings the material property relations in three ways under regulation, namely in a way directly expressing the property relations (state law ownership), secondly, it expresses the property relations coming into being as the outcome of commodity production so that the law statically fixes the results and also the preconditions of commodity production (civil law commodity ownership). Thirdly, the law brings under regulation the property relations come into being in the wake of the organizational activity of the State and constituting a regulation of the

[28] See WASILKOWSKI: *Pojecije wlasnosci w swietle kodeksu cywilnego* (The notion of property in the Civil Code). Panstwo i Prawo, 12/1965. p. 815; STELMACHOWSKI: op.cit. pp. 444–447.

[29] See SAMU, M.: *A vállalati (gazdasági) jog vagy polgári jog birodalmának védelme.* Defence of the realm of enterprisal (economic) or civil law. Magyar Jog, 2/1967.

executive power and the law of property (administrative ownership and ownership of economic management).[30]

The second tendency in ownership of state law relies on the detachment of ownership relating to the enterprise from civil law. Originally it was Karass who created the specific state ownership for enterprises. Already at that time civil law became impliedly doubled: a parallelity of ownership made its appearance, the one relating to the aggregate of things and assets, the other to the traditional notion of things.[31]

With the growth of enterprisal independence and later, in association with the tendency of economic reform this section of civil law literature tried to reinforce the legal status of the enterprise originally conceived by Karass in the position of the "operative manager": proprietor of the enterprise is the State, yet the enterprise, too, is quasi-proprietor, commodity proprietor, etc. of the means of the enterprise:[32] this group of opinions considering the enterprise the object of ownership has come close to the concept of "commodity form" modernizing the construction of Venediktov. The construction considering the enterprise the object of ownership may, however, be built up in another way, as Landhoff already indicated in the course of a dispute going on in Soviet literature in the fifties: the essence of the relations of State and state enterprise is the central state management of economic policy applying to enterprisal management as a whole and not only to concrete items of assets. Consequently state ownership embracing the state enterprise is state law ownership. On the other hand by the side of the state law property of the State the enterprise, in its commodity relations, translates into reality any criterion characteristic of commodity ownership. Therefore statutory law has to recognize the enterprise as the civil law proprietor of its means. The authors rejecting the tendency of economic law coalescing general economic management and commodity relations confess to the joint functioning of commodity ownership of political law implying general economic management and of traditional civil law commodity ownership, and rely on the full-scale development of the indirect socialist planned economy of planned market control by rejecting the extension of the traditional commodity ownership to state economic management and proclaim the segregation of the enterprise from economic management.[33]

[30] See: АЛЕКСЕЕВ: *Предмет советского социалистического гражданского права* (ALEKSEEV, S S.: Subject of Soviet socialist civil law) Свердловск, 1959, стр. 60–61, 73, 285 и сл. et seq.

[31] КАРАС: *Право государственной социалистической собственности* (KARASS: State socialist ownership). Москва, 1954, стр. 60–68, 261–262, 327 et seq.

[32] In Hungarian literature see: BECK, S.: *Az állam és vállalata* (The State and its enterprise). Jogtudományi Közlöny, 5/1968.

[33] In Polish literature: GWIAZDOMORSKI: *Zasadna jednosci panstwowej wlasnosci socjalistycznei a osobowose prawna przedsiebiorstw panstwowijech* (The principle of the unity of state socialist property and the juristic personality of the state enterprise). Panstwo i Prawo, 4–5/1967. pp. 606 et seq.; in Czechoslovak literature ČAPEK: *Majetkopravni postaveni statnich hospodarskych organizaci* (Position of the state economic organizations under property law). Hospodarstvi a Pravo, 1–2/1967. – In Hungarian literature: SÁRKÖZY: *Indirekt gazdaságirányítás, vállalati árutermelés és a tulajdonjog.* (Indirect economic management, enterprisal commodity production and ownership.) Budapest, Akadémiai Kiadó, 1973.

The exposition of the inner peculiarities of the structuralized property or that of state law would of course call for a more detailed analysis, what we cannot at present undertake. A single principle, however, we should like to lay down, viz. it is not the proper course from the very outset to reject the multiplication of the notion of ownership. Whether or not e.g. the segregation of the public law ownership of general economic management and that of civil law have a *raison d'être* will in accordance with what has been set forth above eventually be determined by the concrete building up of the socialist form of planned economy, although it is obvious that even here the relative independence of the law manifests itself in a modifying manner.

Alternativen des sozialistischen Eigentumsrechtsbegriffes

von

T. Sárközy

Im ersten Teil seiner Abhandlung beschäftigt sich der Verfasser mit der Kritik der rechtlichen Betrachtungsweise der Auffassung über das Eigentum und bemüht sich nachzuweisen, welche gleichen und verschiedenen Züge im Begriff des Eigentums in der Volkswirtschaftslehre und im Recht wahrzunehmen sind. Nach den Erörterungen über den Inhalt des volkswirtschaftlichen Eigentums bzw. der Eigentumsformen analysiert er ausführlich die Eigentümlichkeiten der rechtlichen Widerspiegelung der Eigentumsverhältnisse. Der zweite Teil der Abhandlung analysiert die Anwendungsmöglichkeiten des Begriffes »Wareneigentumsrecht« unter sozialistischen Produktionsverhältnissen und stellt fest, daß das aus dem traditionellen römischen Recht geerbte Wareneigentumsrecht nur unter bestimmten Bedingungen geeignet ist, das staatliche Eigentum rechtlich widerzuspiegeln. Dementsprechend muß die Möglichkeit anerkannt werden, daß im Sozialismus mehrere, zu verschiedenen Rechtszweigen gehörende Eigentumsrechte bestehen können. Darauf folgend bearbeitet die Abhandlung die Theorien über die neuartigen sozialistischen Eigentumsrechtsbegriffe, so in erster Linie die Konstruktion des strukturierten wirtschaftsrechtlichen, sowie des staatsrechtlichen Eigentumsrechts als Alternativen der rechtlichen Widerspiegelung der sozialistischen Eigentumsverhältnisse.

Альтернативы социалистического понятия права собственности

Т. ШАРКЁЗИ

В первой части статьи автор подвергает критике понимание собственности только как юридической категории и стремится обнаружить тождества и различия между экономическим и правовым понятием собственности. После изложений о содержании экономической собственности и формах собственности анализируются особенности правового отражения отношений собственности. Во второй части автор анализирует возможности применения понятия права товарной собственности в условиях социалистического производства, и устанавливает, что право товарной собственности, дошедшее до нас из традиционного римского права, способно на правовое отражение государственной собственности только при определённых условиях. Соответственно этому надо признать, что возможно несколько форм собственности при социализме. Вслед за тем автор разрабатывает теории, относящиеся к нового типа социалистическим понятиям права собственности. Так, разрабатываются конструкции структурного хозяйственно-правового, а также государственно-правового права собственности, как альтернативы правового отражения отношений социалистической собственности.

Recensiones

НОВАЯ МОНОГРАФИЯ ПО МЕЖДУНАРОДНОМУ ЧАСТНОМУ ПРАВУ*

Венгерская литература по международному частному праву пополнилась новой ценной работой. Данная книга почти одновременно вышла в свет под тем же заглавием на венгерском и английском языках. Судя по ее содержанию, книга представит значительный интерес для всех специалистов, занятых разработкой проблем международного частного права.

Больше 10 лет назад появилась углублённая сравнительно-правовая статья самого автора о международном частном праве европейских социалистических стран, в которой он излагал свою самостоятельную концепцию о ряде существенных вопросов (коллизия второй и высшей степени; обратная отсылка и отсылка к третьему закону; предмет и место международного частного права в правовой системе, и. т. д.) и во многом содействовал формированию правильной позиции под влиянием множества различных взглядов.

Несколько лет спустя монография под заглавием «Международное гражданско-процессуальное право» (и её издание на английском языке) представляла собой удачное начинание, вызвавшее живой интерес и принятое с большим удовлетворением во всём мире. В ней были показаны своеобразные черты международного гражданского процесса с социалистической точки зрения.

В результате неутомимой работы автора в 1969 венгерское издательство «Экономическая и юридическая литература» могло выпустить в свет его новую книгу «Международное трудовое право», в которой даётся совсем новое суммирование данной тематики, прокладывающее новый путь. Эта книга тоже была издана на английском языке и таким образом стала доступной для зарубежных специалистов.

Рецензируемая книга на 400 с лишним страницах, в частности, подытоживает и систематизирует огромный материал, который содержится и в упомянутых книгах, но там он по-другому был сгруппирован и, конечно, с тех пор уже изменён, что объясняется передвижением во времени. Главные мысли предыдущих работ в этой книге особо подчёркиваются.

Ранее француз Ренэ Давид уже попытался анализировать основы современного сравнительного права, отграничить области права и установить разделительные черты. Социалистическая юридическая специальная литература во многих отношениях согласилась с его мнением. За этими исследованиями следит автор, когда стремится выхватывать общее для обнаружения взаимосвязей из международного частного права капиталистических, социалистических и развивающихся стран. (Капиталистическое право, являющееся естественно уточнённым в отношении деталей, лучше можно сопоставить с тщательно кодифицированным или закалённым практикой социалистическим правом, чем рассыпанные законодательные акты развивающихся стран, которые, помимо этого, труднодоступны, малоизвестны и часто двусмысленны.)

*SZÁSZY, I.: *Conflict of laws in the Western, socialist and developing countries.* Budapest, Akadémiai Kiadó, 1974. 424 p.

Этот трёхсторонний подход означал чрезмерно трудную задачу, так как принципы общедоступности и стремления к полноте столкнулись друг с другом. Было бы и опасение, что кропотливый показ деталей воспрепятствует дальновидности, или же ради непрерывности изложения надо отказаться от второстепенных, но всё-таки значительных вопросов, а этим было бы затруднено направление уверенной рукой в материале.

При разделении темы автор имел в виду разнообразие трёх исследуемых областей и в результате этого обращал внимание и на то, чтобы обрисовывать единую, обозримую картину для читателей. В шести главных частях, составляющих основу разделения, нормы трёх больших областей права, регулирующие или предупреждающие коллизии норм права, обсуждаются не в одинаковой мере и, кроме этого, не в каждой из них. Регулирующие принципы международного частного права в узком смысле слова составляют постоянную основу, на которой строится немало определений автора.

Наряду с коллизией норм международного частного права рассматриваются в отдельности международные коллизии норм права в области семейного, торгового, чекового, вексельного, морского, воздушного, трудового, административного, финансового, а также гражданско-процессуального и уголовно-процессуального права (Часть II). Значит имеем дело с многоплоскостным расчленением коллизий по отраслям и по областям права (капиталистические, социалистические, развивающиеся страны). Всё это служит тому, чтобы со знанием возникновения коллизий норм права на различных общественно-экономических основах можно было показать часто одинаковый или подобный способ решения.

Исходя из общих принципов, группа межрегиональных (Ч. III), межперсональных (Ч. IV) коллизий, а также коллизий во времени (Ч. V) приведёт, через показ различных литературных высказываний, к обоснованным, всегда своеобразным мнениям автора и к следованию его установлениями. Наконец, Часть VI обращает внимание на коллизии между отдельными отраслями и институтами права, которые не относятся к коллизиям во времени, к межрегиональным, межперсональным и другим коллизиям.

Перед этим автор предпосылает своим общепринятым рассуждениям относительно действующего законодательства изучением некоторых вопросов теории права (Ч. I), в рамках чего даётся аналитическая оценка о понятии норм права, о видах коллизий норм права, а также об их возникновении в трёх больших областях права в отношении капиталистических, социалистических и развивающихся стран.

Излагая все положения, входящие в расчёт, автор даёт список источников начиная с классических настольных книг вплоть до новейших статей. Это осовременивает его ценный для исследователей материал.

Понятие права и сущность коллизий норм права, как в позициях идеалистов-неокантианцев, так и в установлениях англичанина Гревсона, можно сопоставить с весом общего высказывания, по которому назначение юрисдикции, выбор права, далее признание и исполнение иностранных судебных решений могут быть подтверждены применением справедливости и целесообразности, а также вежливости («comity»), находящейся в учениях нидерландской коллизионной школы.

Параллельно показывая идеалистическое толкование норм права в трудах Дюлы Мора, Джона Стюарта Милла и Дель Веккио, а также социалистическое понимание в работах венгров Пешки и Вилаги, автор выводит свою позицию из своих публикаций, вышедших в свет за истекшие 25 лет (стр. 14). Рассматривая возникновения правоотношений (juris vinculum), автор исходит из двойного понимания правомочий (right) и обязательств (obligation) и исключает из этого т. н. «позволяющего могущества», содержавшегося в старой буржуазной венгерской литературе по

частному праву (Саси—Шварц и Сладич). Автор придаёт большое значение силе, обеспечивающей осуществление права, то есть тому главенству, которое является господствующим над развитием воли и вытекает из общества, создающего и осуществляющего право. Это заключение очень существенно к тому, чтобы способ урегулирования коллизий норм права в исследуемых трёх областях стал более понятным.

Важность проблематики подчёркнуто обрисовывается в отношении капиталистических и социалистических старн, а нюансирование в отношении развивающихся стран получилось не так блестяще. Некоторые из последних стоят близко к социалистическому лагерю (страны арабского мира) или благодаря численности их населения и источникам сырья они преобладают среди неприсоединившихся стран, где они стоят на стороне прогрессивных сил (Индия, Бирма).

При анализе этого вопроса выясняется, какие глубокие разногласия имеются в концепциях отдельных авторов.

Капиталистические взгляды, коренящиеся в почве общества организованной крупной промышленности, не всегда могут быть сопоставлены первобытному родовому праву бывших колониальных стран. Люди, жившие под властью родового обычного права, имеют главной целью создать правильное уравновешенное положение пересекающихся друг с другом интересов и всё это происходит в целях сохранения правильной пропорции интересов, носящих главным образом имущественный характер.

В некоторых отношениях автор стремится составить «атлас мира» коллизий норм права, поэтому уделяет большое внимание напр. положению народов Дальнего Востока. Через призму исторического развития рассматривает формирование китайского права, выбирая исходным пунктом взгляды Конфуция, которые исходят из последовательного принципа постепенного отмирания права. С XVII в. предпринимались попытки освежения многотысячелетних учений. После 1911 были созданы кодексы по буржуазному образцу, потом в 1949 в ходе общественно-политического преобразования было решено начать социалистическую кодификацию. Вследствие внутренней напряжённости в течение истекших 25 лет эта работа пока не принесла свои плоды.

В другой большой стране Азии, в Японии — вразрез с очевидным американским влиянием — правовое чувство проникается таинственной сентиментальностью. В этом вопросе автор клонится к принятию позиций Р. Давида и Дж. Брайерлея. Наверное, трудность доступа источников и изложенных точек зрения послужила причиной тому, что в дальнейших частях данной книги едва идёт речь об этих двух огромных народах и в структуре книги не находят выражения их коллизионные отношения.

Отвечая на вопрос, что степень развития как можно отмечать между отдельными странами, автор с убеждённостью опирается на экономико-географические и статистические данные (стр. 28). В основе разделения стран на развитые, посредственно развитые и развивающиеся (ныне эти последние обозначаются определением developing вместо underdeveloped) лежит годовой доход на душу населения. Автор вступает в спор с венгерским профессором Йожефом Богнаром о том, что этот контингент сам по себе можно ли считать подходящим отграничивающим знаком. Но цифровые экономические данные, приведённые в связи с этим для масштабного доказания развития права, едва уместны, так как последнее определяется рядом общественно-экономических факторов и национальный доход является только одним, хотя и важным, из их элементов.

Рост населённости, демографический взрыв, и во много раз возрастание численности населения Земли, ожидаемое к 2000 году, значит в течение одного поколения окажут, наверно, в мировом масштабе решающее влияние на развитие общества и параллельно с этим на формирование правового регулирования.

В связи с правовой природой коллизионных норм автор обращает внимание на значение одно- и двусторонних норм, а также на то, что стремление к исключительности одностороннего регулирования коллизий является бессмысленным усилием. Обстоятельность аргументов автора убедительно подтверждает пример, приведённый в связи с Einführungsgesetz BGB, где исключительно односторонние нормы, внесённые в кодекс, стали двусторонними в ходе судебной практики.

Разрабатывая содержание частей II—V, автор применяет метод сравнительного права в самом широком смысле слова. Каждый раздел начинается с изложения высказываний в специальной литературе. Автор ссылается, в большинстве случаев, на установление западных авторов; сопоставляет главные принципиальные точки зрения социалистическому пониманию и излагает свою позицию, звучащую порой по-новому или же до сих пор не изложенную подробно.

После этого следует обзор регулирования в действующем законодательстве отдельных стран. В разном аспекте наброшены гражданские кодексы европейского континента: Code Civil, BGB, австрийский и итальянский ГК, швейцарский Obligationenrecht, Common Law и Основы гражданского законодательства СССР и союзных республик.

При представлении коллизий норм права во времени ясно и обозримо подытоживается всё то, что до сих пор было выяснено автором по существенным вопросам международного частного права на основе его опыта, приобретённого им в международных организациях по разрешению правовых споров, и в результате его многодесятилетней плодотворной научной деятельности.

Межрегиональные и межперсональные коллизии норм права, однако, разрабатываются совсем по-новому, и в этом отношении разработка носит новаторский характер как в венгерской, так и в социалистической литературе по международному частному праву. Поэтому метод изучения и представления материала несколько модифицируется. Источники использованы для обращения внимания на те нормы, которые уже отменены и имеют значение только с точки зрения изложенных положений.

Сбор материала как межрегиональных, так и межперсональных коллизий достоен признания с той точки зрения, что этим некоторые технические решения права консервируются, являясь, подобно мёртвым языкам, богатыми источниками при разрешении жизненных проблем коллизий.

С 1965 года уже отошёл в прошлое польский закон от 1926 г., который часто цитировался в связи с разрешением межрегионального частного права в социалистических странах. Примеры Югославии и Румынии тоже станут устарелыми вследствие исполнения гражданско-правовой кодификации в этих странах. В отношении Советского Союза и США может возникать межрегиональная коллизия, но в другом аспекте. На столкновение state law и federal law, а также на коллизию между штатами-членами США уже со времён Д. Стори стали всё более обращать внимание, и это придало размах практике международного частного права в США.

Законодательство советских социалистических республик различается в некоторых деталях, в первую очередь в отношении семейного, имущественного и наследственного права. Но их столкновения не могут быть разрешены применением общих положений коллизионного права (стр. 274), так как эти отвечают только за то, что при рассмотрении данного правового спора применяется ли советское право. Когда ответ положительный, внутренние правила советского права устанавливают, что право которой из заинтересованных республик применяется.

Реформа конституции от 1968. г. в Чехословакии служит новым примером, хотя ввиду прежних единых кодексов, неизменно сохраняющих свое действие, пока редко можно считаться с возникновением коллизий.

Межперсональные коллизии свойственны государствам, образованным на бывших колониальных территориях Африки и Азии. В этом отношении показываются также старые или спадающие условия, но существуют глубоко коренящиеся традиции, чьи религиозные и общественные связи крепко пронизывают данную общность и, быть может, они удержатся и после перехода к современному правовому регулированию. Естественно, европейский исследователь должен считаться с тем, что здесь речь может идти только о медленном процессе, ибо дух родовых примитивных прав ещё долго будет существовать в некоторых группах этих стран.

Настоящая книга даёт яркий пример тому, что правильно применяя метод сравнительного права как можно раскрыть внутренние, часто скрытые связи между коллизионными нормами, и обращает внимание на то, что несмотря на различную количественную тенденцию и качественную степень общественно-экономического развития в каждой стране надо считаться с возникновением коллизий норм права и необходимостью их решений.

Й. Карлоцаи

Varia

Les problèmes actuels de la protection de la propriété industrielle

(Conférence internationale, Budapest, 24–28 septembre 1973)

I. Les consultations dans le cadre des organisations sociales contribuent aussi dans une mesure appréciable au travail reconnaissant le caractère international et l'importance de la coopération scientifico-technique et se préoccupant d'en déduire les conséquences nécessaires dans le domaine des réglementations de droit et de l'unification du droit. Dans les lignes de ces consultations on peut considérer comme un événement significatif la conférence internationale organisée par l'Association Hongroise pour la Protection de la Propriété Industrielle et par le Groupe Hongrois de l'AIPPI à Budapest, en septembre 1973 sur « les problèmes actuels de la protection de la propriété industrielle ». Lors de la conférence ont été discutés les problèmes concernant les inventions de caractère microbiologique, le know-how et le software.

Le choix du thème juste a été dûment reflété par l'intérêt manifesté à l'égard des consultasions. En dehors d'environ 200 spécialistes du pays ont participé plus de 300 spécialistes de 33 pays, et les organisations internationales fonctionnant sur le territoire de la protection de la propriété industrielle (WIPO, AIPPI) ont été représentés également à un échelon élevé.

Après les exposés introductifs présentés à la première assemblée plénière a eu lieu la discussion des différents problèmes dans les séances des sections, ensuite ont été tenu les résumés des discussions de nouveau aux assemblées plénières.

II. Dans la section s'occupant des problèmes de know-how, en dehors de 13 rapports et co-rapports quinze participants ont pris la parole dans la discussion.

a) Nombre d'intervenants se sont occupés de *la définition du know-how*. A ce sujet ne s'est pas formée une manière de voir commune, la discussion a conduit en tous cas à l'intelligence plus claire des différents points de vue et à l'égard de certains éléments de notion les attitudes se sont éclaircies. Ainsi par exemple l'attitude est devenu unitaire – ainsi que M. *I. Gazda*, le chef de la section a souligné dans son résumé – que le know-how appartient au domaine des créations intellectuelles, contenant une information d'une valeur économique et en conséquence de cela d'un caractère de moyen compétitionnel, voire – a indiqué M. *J. Lecca* (France) – la valeur du know-how dépasse dans la pratique maintes fois la valeur des inventions brevetées. En s'y référant M. le professeur *A. Kopff* (Pologne) a souligné que le caractère de création intellectuelle du know-how est de l'importance primaire aussi dans le cas où par ailleurs le know-how se présente matérialisé dans une certaine forme (p. e. dessins etc.). D'ailleurs, la majorité des intervenants ont rétréci leurs exposés au know-how de caractère industriel, quoique M. *Mukawa* (Japon) et M. *A. Kopff* ont souligné que les informations ayant une valeur économique fonctionnent également avec succès sur d'autres territoires, par exemple sur le territoire de l'organisation, de l'administration, de la propaganda etc. La notion du know-how proprement est donc plus large que les solutions de caractère seulement technique. La majorité des opinants ont été également d'accord que la valeur, ainsi que la notion du know-how (du know-how de caractère technique) ne sont pas déterminées d'une façon univoque non plus par le niveau technique de l'information respective, notamment le fait qu'en tant qu'invention elle pourrait bénéficier de protection de brevet (ou d'autre protection).

La discussion sur la définition du know-how s'est déroulée en premier lieu autour de la question qu'en quoi peut on considérer le secret de l'information comme un élément de notion.

A cet égard les divergences des opinions ont continué à persister. Ainsi par exemple M. *M. L. Gorodisski* (Union Soviétique) et M. *G. S. A. Szabó* (Grande-Bretagne) ont souligné avec vigueur le secret en tant qu'une caractéristique notionnelle. L'une des causes des divergences des opinions est supposablement aussi le fait que la notion même du secret, de la qualité de secret n'est pas déterminée non plus d'une manière univoque. Lors du départ des différentes attitudes on peut en maints cas découvrir l'inercie de la réglementation normative du pays. On a insisté beaucoup dans la discussion (p. e. M. le professeur *J. Azéma*, France) à l'égard du caractère relatif du secret tant en ce qui concerne la sphère des personnes que la durée dans le temps. M. *J. Lecca* a rappelé que le know-how constitue « un ensemble des connaissances développées », c'est-à-dire un complexe d'informations, dont éventuellement certains éléments seulement, ou bien précisément l'assemblage nouvelle des éléments connus sont secrets, respectivement connus non par tout le monde. Enfin on peut affirmer, même si l'on ne considère pas le secret au sens strict comme un élément notionnel, il est toutefois hors de doute que le know-how contient nécessairement des éléments qui ne sont pas de notoriété en toute mesure, puisque en dernière analyse sur cela repose sa valeur économique, de circulation.

b) La discussion la plus large s'est déroulée dans les problèmes du *contrat* concernant la prestation du *know-how*. Ainsi plusieurs participants se sont occupés du *caractère* de ces contrats au point de vue des obligations. La discussion a eu lieu d'une part autour du problème, quelle est la nature juridique de la prestation du débiteur, notamment de caractère dare ou facere, respectivement les genres de contrats traditionnels (p. e. les contrats de vente, d'entreprise etc.) en quoi sont adéquats pour la caractérisation du contrat de know-how, ensuite à l'égard du rapport entre le contrat de licence traditionnel et le contrat de know-how.

A la première question plusieurs intervenants (en premier lieu M. *P. Sebestyén*) ont donné la réponse que le contrat de know-how arrête une prestation de caractère facere, donc il est de type d'entreprise eu égard au fait que dans ce cas le prestateur transfère non pas un droit, mais un fait, des connaissances effectives. D'autres opinants (p. e. MM. *J. Azéma, E. Lontai*) ont indiqué que la différence n'est point du tout aussi intensifiée, du fait que le contrat de know-how contient également des éléments de dare, il est donc de caractère mixte. Les intervenants ont renvoyé au fait que dans les contrats de licence traditionnels s'augmente aussi le poids des éléments de facere, ensuite qu'en rapport avec le know-how il ne suffit pas de parler seulement « d'un état de monopole de facto » (M. *S. Sandri*, Italie), cet état effectif comporte aussi des conséquences juridiques, même si elles ne sont pas identiques avec les attributions de structure absolue du breveté. En conséquence la différence entre le contrat de licence traditionnel et le contrat de know-how n'est guère indiquée de constituer un type de contrat pleinement autonome.

Nombre de participants (MM. *J. Azéma, C. Kamm*, Suisse, M. le professeur *A. Verona*, Yougoslavie) se sont occupés des conditions usuelles des contrats de know-how, soulignant les conséquences des défectuosités techniques et juridiques de la prestation et les problèmes de la responsabilité et de la garantie. Les intervenants ont présenté une image colorée sur les règles normatives – rares et laconiques – des différents systèmes de droit, sur les conditions des contrats standards formées dans la pratique et sur les problèmes inhérents. Ils ont souligné (en particulier MM. *A. Kopff, G. Szathmáry)* le rôle des modèles adéquats de contrats ou plutôt des « checking list-s » facilitant les contractations, éventuellement le desideratum de l'élaboration internationale de celles-ci, en soulignant cependant le caractère expressément individuel de ces contrats, la nécessité de la rédaction soigneuse et détaillée des conditions contractuelles.

Les opinants se sont occupés ensuite des problèmes de la collaboration entre les parties contractantes, en premier lieu de l'obligation de l'information, respectivement de la remise concernant le perfectionnement du know-how et des problèmes nommés « grantback » (MM. *S. P. Ladas*, USA, *A. Verona*). Il faut mettre en évidence à ce sujet les exposés de M. *S. Vida* à l'égard des « familles de know-how », c'est-à-dire relatifs aux problèmes en rapport avec la coopération des organes qui collaborent dans le développement et le perfectionnement d'un complexe

know-how. Certains intervenants (MM. *J. Azéma, C.Kamm*) ont fait également des observations intéressantes relatives aux éléments post-contractuels, notamment au sujet qu'en quoi le bénéficiaire du know-how est autorisé d'utiliser les informations en question après l'expiration du contrat.

c) Un grand intérêt a produit le rapport de M. *S. P. Ladas*, qui a mis en lumière les différents aspects de *droit de concurrence* des contrats de know-how, en passant en revue les solutions et la pratique appliquées dans les différents systèmes de droit touchant les rapports de la législation nommée antitrust et des contrats de know-how, en abordant en même temps les problèmes similaires survenant dans le cadre des communautés d'intégration économique (p. e. le Marché commun européen).

D'un part le rapport ci-dessus, d'autre part le co-rapport de M. *S. K. Datta* (Indie) ont relevé les particularités résultant de la position des états en développement dans le domaine du courant des informations techniques.

Le rapport de MM. *M. L. Gorodisski* et *S. Vida* a mis en lumière les problèmes en connexion avec la coopération d'entre les pays socialistes, respectivement entre leurs organisations économiques, avec les différentes variantes contractuelles de la collaboration technico-scientifique, avec le rôle des éléments de know-how dans les différentes formes de la collaboration (spécialisation, coopération, entreprise commune etc.).

d) Enfin nombre d'intervenants se sont occupés des idées, des propositions en connexion avec la protection nationale et internationale du know-how.

Ils ont remarqué que dans la pratique aucun système de droit ne connaît pas une réglementation spéciale protégeant le know-how. L'on a reconnu en général la justesse d'une pareille réglementation spéciale, mais en ce qui concerne ses possibilités, ses formes pratiques, les opinions étaient très divisées. Suivant l'opinion de la majorité (en particulier d'après MM. *M. Mukawa* et *S. Sandri*) c'est la protection indirecte qui promet succès en premier lieu, ainsi qu'à l'heure actuelle d'une part les règles générales du droit des obligations, d'autre part les normes interdisant la concurrence déloyale accordent plus ou moins une protection pour le know-how. M. *J. Lecca* a indiqué la possibilité d'une forme de protection spécifique similaire au modèle d'utilité.

Un nombre de participants soulignaient qu'il faut avancer au premier plan la protection internationale du know-how, respectivement la formation d'une manière de voir internationale commune, qui peut servir de base pour la création d'un droit national relativement unitaire. Ils ont rappelé le rôle actif joué sous ce rapport jusqu'à présent aussi par l'AIPPI, continuant à rester l'une de ses tâches de premier ordre.

III. L'invasion de la technique de calcul dans tous les domaines de l'activité technico-économique, voire scientifique a souligné avec vigueur l'importance des questions en connexion avec la protection juridique des programmes d'ordinateurs électriques nommées *software*. Sur la base des 11 rapports respectivement co-rapports se développait également une discussion très vive dans cette section, dont M. *Gy. Szendy* a présenté un tour d'horizon par son résumé.

a) Les intervenants dans la discussion se sont occupés en premier lieu du caractère, de la nature du software, du rapport des ordinateurs et des programmes, du rôle relativement autonome, de l'importance et de la valeur économique des programmes. Ils ont exposé que le software ne constitue pas une catégorie unitaire, qu'il présente nombre de variantes, dont une bonne partie sont en effet de caractère de routine, mais en maints cas se qualifie d'être une création intellectuelle significative, ensuite que le software contient bien des fois assez d'éléments « hards-s » aussi (MM. *P. Kirby*, Canada, *J. F. Boissel*, France, *F. Mossig*, Autriche).

A ce sujet M. *R. Sikos* (en partie *M. J.F. Boissel* aussi) souleva au point de vue de principe la réflexion du fait que les institutions d'invention, de brevet traditionnelles, la protection de la propriété industrielle en général ont déjà dépassé certainement le modèle industriel pris dans un sens plus restreint et que – eu égard aux conditions et également aux conséquences de la révolution scientifico-technique – il faudrait transformer le modèle technico-centrique et produit-centrique de sorte qu'il concentre plutôt à la création intellectuelle, au rendement intellectuel même.

b) Les intervenants ont examiné ensuite surtout le problème si de lege lata le software a une protection et de quelle nature dans les différents

systèmes de droit, respectivement de lege ferenda existent des propositions, des conceptions. Les thèses peuvent être groupées approximativement comme suit: protection du droit d'auteur, protection du brevet, respectivement à l'intérieur de celles-ci certaines idées de réforme, protection du droit de contrat, règles de droit de concurrence, respectivement autres solutions.

On peut dire commune la solution de tous les systèmes de droit – ont précisé les participants de la discussion – qu'ils protègent les programmes de caractère exempt de routine, représentant vraiment une création intellectuelle, en leur appliquant les règles du *droit d'auteur*. (Cette thèse a été illustrée par un litige tout récent du pays exposé par le co-rapport de M. *A. Benárd*, rencontrant un grand intérêt.) Toutefois, la majorité des intervenants sont arrivés à la conclusion que la protection du droit d'auteur – quoique meilleur que rien – (M. *F. Gevers*, Belgique) n'est pas dûment efficace, n'assure pas les intérêts économiques significatifs inhérents au software. A cet égard a fait exception M. *J. I. Plotnikoff* (Union Soviétique) qui dans son rapport présentant un tour d'horizon très large et exceptionnellement riche en idées est arrivé à la conclusion que le software peut être protégé de manière la plus adéquate par les règles du droit d'auteur.

Les intervenants ont considéré en grande majorité comme possible respectivement désirable la protection des programmes dans le cadre du droit de brevet. Quelques-uns d'eux (p. e. MM. *H. G. Lyfield*, Grande-Bretagne, *F. Gevers*, *J.F. Boissel*) ont qualifié cela possible déjà sur la base des réglementations en vigueur aussi (p. e. dans les formes du brevet de processus), mais la majorité, les partisans du brevet (MM. *P. Kirby*, *G. Kolle*, RFA, *J. Corre*, France) ont renvoyé aux difficultés inhérentes, et pour cette raison ont urgenté une certaine transformation du régime des brevets, une réglementation spéciale adaptée au caractère du software, se plaçant toutefois dans le cadre du régime des brevets. Les difficultés avec lesquelles la nouvelle réglementation devra compter, respectivement lesquelles elle devra résoudre se présentent surtout sur le territoire de la classification et de l'examen de la nouveauté, et c'est problématique si sous ce rapport il ne devrait pas abréger la durée de la protection. (MM. *G. Kolle* et *F. Gevers* ont renvoyé au fait que les difficultés de l'examen de la nouveauté en elles-mêmes ne peuvent pas susciter des obstacles, puisque avec cette argumentation on pourrait exclure nombre d'autres territoires de la sphère du brevet, en se référant simplement au caractère compliqué de l'invention.) Il y en a été qui jugeait en principe impropre le régime des brevets pour la protection des programmes, ainsi en premier lieu M. *J. I. Plotnikoff* et en partie M. *F. Bányai*.

On exprimait des idées sur des autres méthodes possibles, p. e. à l'aide des règles relatives au know-how, aux innovations, éventuellement à la concurrence déloyale. M. le professeur *B. Pilawski* (Pologne) a arrêté – il est vrai que seulement à l'égard d'un seul genre concret des programmes, notamment de la programme de l'ordinateur électrique digital – son attitude que les garanties contractuelles présentent la protection la plus efficace.

Ainsi que dans le cas du know-how, sous ce rapport aussi nombre d'intervenants (en particulier MM. *P. Kirby*, *F. Gevers*, *F. Bányai*, *F. Mossig*, *Gy. Szendy*) ont souligné la nécessité d'une réglementation internationale coordonée et dans la mesure du possible unitaire.

IV. La troisième section a discuté les problèmes de la protection des inventions du domaine de la *microbiologie*. Sur la base des 13 rapports et co-rapports, respectivement des 22 interventions Mme. *É. Somfai* a pu rendre compte par son résumé que les manières de voir se plaçant sur une échelle large et hétérogène avaient présenté plutôt l'image des variantes de solutions possibles que des conceptions unitaires.

Ainsi que résulte de la pratique internationale de nos jours les différents systèmes de droit – eu égard aux thèmes mentionnés ci-dessus – quoiqu'ils protègent en général les inventions de microbiologie pour la plupart par une certaine réglementation spéciale dans le cadre du régime des brevets, ce fait ne signifie pas du tout une exemption de problèmes, la discussion en est témoin.

a) La première question de la discussion était ce que qui constitue *l'objet de la protection*. On pourrait dire assez général le fait que les microorganismes peuvent obtenir en premier lieu un brevet de processus (éventuellement product by process). La concession d'un brevet de produit, respectivement de matérial est plus rare, parce que certaines races se rencontrent dans la nature aussi, respectivement peuvent être séparées d'elle. Plusieurs participants (ainsi MM. *A. Mándi*, *V. Vos-*

sius, RFA, *G. S. A. Szabó*, Grande-Bretagne) se déclaraient fermement pour la concession du brevet de produit. Mais M. *E. v. Pechmann* (RFA), qui avait présenté le rapport principal, a qualifié cette possibilité illusoire.

Une question intéressante a été exposée sur la base de la réglementation hongroise en vigueur par Mme. *É. Parragh*, en indiquant que – suivant elle – la protection de la race des microorganismes peut être assurée d'une manière plus efficace par l'application des règles relatives au brevet des espèces de plante. En connexion avec cela ont surgi des doutes (p. e. M. *G. S. A. Szabó*), notamment au point de vue, comment peut on qualifier les microorganismes, respectivement certaines variantes d'eux de plante, p. e. les virus.

Une autre question de discussion était si la protection relative à la race s'étend aux variantes, aux mutations. Cette question avait également des partisants (MM. *A. Mándi, Y. Paillet*, France), ainsi que des adversaires (p. e. Mme. *É. Parragh*).

Les intervenants ont effleuré enfin le problème de la qualité de l'invention, en rappelant que – tout comme dans le cas du software – parmi les solutions de nature microbiologique il y a également beaucoup de caractère de routine. La délimitation, bien sûr, n'est pas simple ici non plus.

b) La plupart des systèmes de droit conditionnent la protection de brevet des microorganismes à la mise en dépôt de la race constituant l'objet du brevet. Les différents aspects de la mise en dépôt ont occupé également une place signifiante dans la discussion.

Ainsi par exemple l'on a discuté le caractère obligatoire de la mise en dépôt dans tous les cas. Plusieurs intervenants (MM. *Y. Paillet, A. Hüni*, Suisse, *M. Bellenghi*, Italie) ont invoqué les effets de celle-ci sous le rapport des dépenses et des autres influences et ont exposé que la mise en dépôt est nécessaire, si la description ne présente pas des informations adéquates pour le spécialiste.

Nombre de variantes ont surgi également à l'égard de la date de la mise en dépôt (avant la demande etc.), mais la question la plus passionante a apparu au sujet où doit être le lieu de la mise en dépôt. Nombre d'intervenants (MM. *T. Palágyi, K. F. Ross* USA, *A. Hüni, V. Vossius, M. de Brabanter*, Belgique, *E. Negro*, Italie) ont souligné que des conditions technico-scientifiques sont nécessaires pour le traitement technique des races déposées, mais peut-être il est plus important que le lieu du dépôt assure des garanties correspondantes pour le déposant. On a présenté des propositions détaillées, qui et à quelles conditions peut inspecter les microorganismes déposités, notamment en ce qui concerne la motivation du traitement assurant l'accès secret ou au moins limité.

c) Bien entendu, dans cette section a également apparu avec vigueur l'exigence de la nécessité de la réglementation et de l'unification *internationales*. La section a rédigé nombre de propositions adressées à l'AIPPI, ensuite l'on a souligné que le rôle de l'organisme administrant le traitement du dépôt pourrait remplir de la manière la plus correspondante un institut (éventuellement plusieurs) de caractère et d'autorité internationaux assurant les garanties nécessaires au degré le plus élevé.

V. Si l'on veut apprécier les résultats de la conférence, il faut souligner en premier lieu et de nouveau l'actualité des thèmes. On a examiné des problèmes qui sont appelés à assurer la protection juridique, respectivement la protection la plus adéquate des créations d'une importance proéminente dans le développement technico-scientifique de nos jours, et la réglementation inopportune et tardive desquelles peut devenir un obstacle du progrès. Les questions, décidément ont servi non seulement des buts pratiques, mais également ont souligné avec vigueur la nécessité de la réflexion et du perfectionnement des bases théoriques, tant par rapport aux créations intellectuelles que par rapport au droit contractuel.

Naturellement, les discussions ne se sont pas terminées, elles n'ont pas engendré qu'en peu de cas des attitudes unitaires, cristallisées, mais en tous cas ont fait plus claires les différentes conceptions et nous ont approchés à une solution circonspecte, unitaire au point de vue international et assurant l'harmonie des intérêts de niveaux différents. C'est pourquoi nous partageons dans la plus grande mesure l'optimisme du M. *Gyula Horváth*, le président et l'amphitryon de la conférence, qui a exprimé le bon espoir que les questions discutées obtiendront dans un délai à prévoir une solution, servant par cela d'exemple et dégageant des énergies pour la solution des problèmes perspectifs – déja pressentis, mais certainement croissants – surgissant dans le domaine de la protection de la propriété industrielle. En tous cas, la conférence a contribué d'une manière efficace à la mise au point et à la solution de ces tâches.

E. LONTAI

Bibliographia

HUNGARIAN LEGAL BIBLIOGRAPHY 1974, 1st PART[1]

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Hatályos jogszabályok gyűjteménye. 1945—1972. Közzéteszi a Magyar Forradalmi Munkás-Paraszt Kormány Titkársága — az Igazságügyi Minisztérium — a Legfőbb Ügyészség. Szerk. *Gál* Tivadar—*Katona* Zoltán—*Szilbereky* Jenő. [Collection of legal rules in force. 1945—1972. Compil. a working group composed of officials of the Secretariat of the Government, the Ministry of Justice, and the Procurator General's Office. Ed. *Gál* Tivadar — *Katona* Zoltán—*Szilbereky* Jenő. Сборник действующих законодательных актов 1945—1972 гг. Публ. Секретариат Венгерского Революционного Рабоче-крестьянского Правительства — Министерство юстиции — Генеральная прокуратура. Ред. *Гал* Тивадар — *Катона* Золтан — *Силбереки* Енэ.]

1. köt. Törvények, országgyűlési határozatok, törvényerejű rendeletek, elnöki tanácsi határozatok. [Vol. 1. Acts, parliamentary resolutions, law-decrees, resolutions of the Presidium. Том 1. Законы. Решения Государственного собрания. Указы. Решения Президиума.]
Bp. Közgazdasági és Jogi Kiadó, 1973. [1974.] 728 p.

2. köt. Minisztertanácsi rendeletek és minisztertanácsi határozatok. [Vol. 2. Government decrees and government reso-

[1] Edited by Lajos *Nagy* and Katalin B. *Veredy*. This bibliography contains legal works of Hungarian authors issued as monographs in Hungary between the 1st of January and the 30th of June 1974., material of periodicals (articles of book reviews) and studies published in collective works.

The material for the period 1965 is resumed in the following publication: Bibliography of Hungarian legal literature. 1945—1965. Budapest, Akadémiai Kiadó, 1966. 315 p.

The material published from the 1st of January, 1966 is currently processed half-yearly in the Acta Juridica, beginning with the Tomus 8, 1966. Nos 3—4.

Periodicals processed in this bibliography: ÁI. 1—5/1974.; ÁJ. 4/1973 [1974.]; AJurid. 3—4/1973 [1974.] Gazd-Jogtud. 3—4/1973 [1974.] JK 1—5/1974; MTud. 1—6/1974.; TSZ 1—6/1974.

Abbreviations of periodicals and other abbreviations see in the Acta Juridica, Nos. 1—2 of 1972.

Collective works processed in this bibliography and their abbreviations:

Acta Bp. Tomus 15. 1973. = A budapesti Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Karának actái 15. köt. Szerk. a Kar tudományos és módszertani bizottsága. Acta Facultatis Politico-Iuridicae Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae. Tomus 15. Red. Commissio scientiae et methodi studiorum facultatis. Bp. Állami ny. 1973 [1974.] 215 p.

Jogtört. tanulm. 3. = Jogtörténeti tanulmányok. 3. [köt.] Szerk. *Csizmadia* Andor. [Studies on the history of law. Vol. 3. Ed. *Csizmadia* Andor.] Bp. Közgazdasági és Jogi Kiadó, 1974. 289 p.

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ВЕНГЕРСКАЯ ЮРИДИЧЕСКАЯ БИБЛИОГРАФИЯ 1974, 1-ая ЧАСТЬ[1]

Справочные издания

Сборники законодательства

[1] Библиография составил Л. *Надь*—К. Б. *Вереди*.

Настоящая билиография содержит в себе самостоятельные юридические издания, материалы, опубликованные в сборниках за время с 1 января до 30 июня 1974 г.

Материал от 1945 до 1965 гг. опубликован: [Библиография венгерской литературы. 1945—1965.] Budapest, Akadémiai Kiadó, 1966. 315 p.

Библиография материала появившегося с 1 января 1966 г., опубликуется последовательно по полугодиям в журнале „*Acta Juridica*" начиная с № 3—4. тома 8. 1966.

Разработанные журналы:
ÁI. 1—5/1974; ÁJ. 4/1973. [1974.];AJurid. 3—4/1973. [1974.]; GazdJogtud. 3—4/1973. [1974.]; JK 1—5/1974.; MTud. 1—6/1974.; TSZ 1—6/1974.

Сокращения журналов и другие сокращения см. в журнале в 1—2. номерах 1972 г.

Разработанные сборники и их сокращения:

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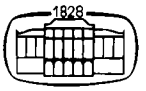

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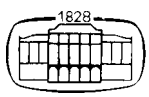

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